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IN THE

Supreme Court of the United States

DEUTSCHER TENNIS BUND, ROTHENBAUM SPORTS GMBH AND QATAR TENNIS FEDERATION,

Petitioners,

v.

ATP TOUR, INC., ETIENNE DE VILLIERS, CHARLES PASARELL, GRAHAM PEARCE, JACCO ELTINGH, PERRY ROGERS, IGGY JOVANOVIC AND JOHN DOES 7-9,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under the Court's "quick look" antitrust law jurisprudence, which applies when challenged conduct is not illegal *per se* but nonetheless has self-evident anticompetitive impact, a Sherman Act § 1 plaintiff need not prove a relevant market in which defendant has market power, and defendant bears the burden of proving procompetitive justifications for the facially anticompetitive practice. The questions presented are:

1. May defendants justify conduct that has self-evident anticompetitive impact in one market (*e.g.*, a horizontal restraint in the market for player services, in which members of a professional sports organization compete with each other) by claiming the practice has procompetitive effects in different markets (*e.g.*, the spectator sports and entertainment markets).

2. When defendants proffer procompetitive justifications for a horizontal restraint or other facially anticompetitive practice, does the quick look presumption of anticompetitive impact "disappear," thereby requiring that a § 1 plaintiff must now prevail on the "relevant market" and "market power" inquiries the quick look doctrine is intended to obviate, and shifting to plaintiff the burden of proving that the net impact of the challenged conduct is anticompetitive.

PARTIES TO THE PROCEEDING BELOW AND RULE 29.6 STATEMENT

The caption contains the names of all parties to the proceeding below.

Petitioners Deutscher Tennis Bund and Rothenbaum Sports GmbH are non-governmental entities with no parent corporations. Petitioner Qatar Tennis Federation is a governmental organization. No publicly held company holds 10% or more of the stock of Deutscher Tennis Bund or Qatar Tennis Federation. Duetscher Tennis Bund and Qatarian Tennis Federation Germany GmbH each hold 10% or more of the stock of Rothenbaum Sports GmbH. Non-party Qatarian Tennis Federation Germany GmbH, as a stockholder in Rothenbaum Sports GmbH, has a financial interest in the outcome of this proceeding.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Deutscher Tennis Bund, Rothenbaum Sports GmbH and Qatar Tennis Federation (Federations) seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

On June 25, 2010, the United States Court of Appeals for the Third Circuit issued an opinion and judgment reported at 610 F.3d 820 (3rd Cir. 2010) and reproduced in the appendix to this Petition ("App.") 1a-41a. The judgment of the United States District Court for the District of Delaware, entered on October 3, 2008, is not reported and is reproduced at App. 42a. Bench rulings of the district court pertinent to the issues presented are not reported and are reproduced at App. 43a-50a.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1337 based on claims under 15 U.S.C. §§ 1, 2 and 26, and under 28 U.S.C. § 1367 for supplemental claims. The court of appeals had jurisdiction under 28 U.S.C. § 1291. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION

The statutory provision at issue (Sherman Act § 1, 15 U.S.C. § 1) is reproduced at App. 51a.

INTRODUCTION AND SUMMARY OF ARGUMENT

Last Term, the Court resolved misunderstanding and conflict in applying its "single entity" antitrust jurisprudence, holding that while members of a professional sports league may be a single entity incapable of conspiring for Sherman Act § 1 purposes when collaborating on certain activities in one market, this did not justify treating them as a single entity in a different market in which they competed with each other. *Am. Needle, Inc. v. NFL*, 560 U.S. ___, 130 S. Ct. 2201 (2010).

The instant case, also involving § 1 claims against members of a professional sports organization, shows that the Court needs to resolve misunderstanding and conflict among the courts of appeals in applying its "quick look" antitrust jurisprudence.

The challenged conduct is a horizontal agreement among tournament members of the ATP professional tennis organization, under which they eliminated competition with each other for participation of top players on which tournament success depends, and severely impeded other tournaments' ability to compete for such player services. The Third Circuit recognized that the agreement (called the "Brave New World" plan) has anticompetitive impact in the player-services market, but held it could be justified by claimed procompetitive effects in the "sports and entertainment markets." The court also held that if a defendant offers claimed procompetitive justifications for facially anticompetitive conduct, the "quick look" presumption

of anticompetitive impact "disappears," requiring the market proof by plaintiff that the quick look doctrine obviates when anticompetitive impact of challenged conduct is self-evident.

This contravenes this Court's "quick look" precedent, and conflicts with application of that law by other courts of appeals, in multiple critical respects.

"Quick look" doctrine applies when challenged conduct, while not illegal *per se*, has readily apparent anticompetitive impact, obviating need to prove a relevant market in which defendant has power. "As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output." *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 109 (1984). When "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anti-competitive effect on customers and markets," *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999), defendant has "a heavy burden of establishing an affirmative defense which competitively justifies [the] apparent deviation from the operations of a free market," *NCAA*, 468 U.S. at 113.

The Third Circuit recognized respondents' horizontal agreement had anticompetitive impact in the player-services market in which ATP tournaments competed. App. 32a ("the Brave New World Plan might have deprived the marketplace of potential competition"); *id.* ("Professional sports teams or tournaments always have an interest in obtaining the best players possible"); App. 32a-33a ("The record in

this case indicates that the individual tennis tournaments traditionally compete for player talent"). But it held respondents presented valid justifications by claiming their anticompetitive agreement had procompetitive impact in different markets – "the sports and entertainment markets." App. 8a, 22a.

This itself contravenes this Court's authority, and conflicts with decisions of other courts of appeals, under which anticompetitive impact in one market may not be justified by claimed procompetitive effects in another. *E.g.*, *United States v. Topco Assocs.*, 405 U.S. 596, 610-12 (1972); *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 370-71 (1963); *Smith v. Pro Football, Inc.*, 593 F.2d 1183, 1196 (D.C. Cir. 1978).

The Third Circuit also held that even under "quick look" analysis, the Federations' § 1 claims failed because they had not proved a "relevant market." In the panel's view, if defendant offers procompetitive justifications for facially anticompetitive conduct, "the 'quick look' presumption [of anticompetitive impact] disappears" and the case reverts to what the court called "full-scale rule of reason analysis." App. 23a.

This fundamentally distorts and misapplies this Court's quick look jurisprudence, and again conflicts with decisions of other courts of appeals. It also strips the quick look doctrine of practical import.

Proof of a relevant market in which defendant has power has no independent significance in § 1 analysis. "[T]he purpose of the inquiries into market definition and market power is to determine whether an

arrangement has the potential for genuine adverse effects on competition." *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 460 (1986). If anticompetitive impact is facially evident (the premise of quick look doctrine), there is no need for market and market power proof.

Hence, defendant's procompetitive justifications for facially anticompetitive conduct do not mean plaintiff must now "prove" a market under a court's view of "full-scale" rule of reason analysis. Defendant's justifications do not alter that the challenged practice (*e.g.*, the horizontal restraint here) has facial anticompetitive impact. Since showing such impact is "the purpose of the inquiries into market definition and market power," *Indiana Dentists*, 476 U.S. at 460, there is no basis to revert to those market inquiries when anticompetitive impact is apparent, as it is by definition in cases warranting quick look review. The contrary analysis below also conflicts with decisions of other courts of appeals, holding that market inquiries have no role in such cases. See *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005); *Cal. ex rel. Brown v. Safeway, Inc.*, ___ F.3d ___, 2010 WL 3222187, at *15 (9th Cir. 2010); *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019-20 (10th Cir. 1998).

Shifting the burden of proving anticompetitive impact to plaintiff when defendant proffers claimed procompetitive justifications also contravenes this Court's authority, and highlights circuit conflict on another key "quick look" issue. This Court holds that when anticompetitive impact is apparent, defendant has "a heavy burden of establishing an affirmative defense which competitively justifies" the conduct. *NCAA*, 468

U.S. at 113. Despite this instruction, courts of appeals are split on this issue. *Compare N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 352 (5th Cir. 2008) ("burden remains on the challenger" to show conduct does not have net procompetitive impact); App. 21a-22a (citing *Specialty Physicians*), *with Safeway*, 2010 WL 3222187, at *17 (9th Cir.) ("burden of proof is shifted to the defendant"); *Law*, 134 F.3d at 1021 (10th Cir.) ("disagree[ing] with the Fifth Circuit's allocation of the burden of proof"; "burden shifts to the defendant to justify the restraint").

The reasoning below also renders this Court's quick look jurisprudence a practical nullity. Antitrust defendants will always be able to proffer some procompetitive justification for challenged conduct (particularly if, as wrongly allowed below, defendants may point to supposed positive impact in different markets). Under the Third Circuit's reasoning, quick look becomes a meaningless exercise: After plaintiff shows a facially anticompetitive practice warrants application of quick look, whose premise is that market proof is unnecessary when anticompetitive impact is apparent, quick look "disappears" when defendant advances procompetitive rationales – making plaintiff's case fail absent the "market" evidence quick look doctrine obviates.

Finally, the Third Circuit mistakenly viewed application of "quick look" and what it called "full-scale rule of reason analysis" as an "either-or" choice, with quick look being exclusively for the court with no role for the factfinder. App. 23a.

"Rule of reason" balancing is not an "alternative" to quick look. Rather, it involves a different aspect of antitrust analysis, which may apply in quick look cases as in any antitrust action not involving *per se* violations. Quick look addresses whether "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect," *California Dental*, 526 U.S. at 770, "even in the absence of a detailed market analysis," *NCAA*, 468 U.S. at 110. If so, the consequence is that plaintiff need not "prove" a relevant market or market power, whose sole purpose is showing anticompetitive impact, which by definition is not needed in quick look cases.

The only aspect of antitrust analysis "abbreviated" in quick look cases involves eliminating need for such market proof. A factfinder's "rule of reason" balancing still occurs if defendant proffers procompetitive justifications. Under rule of reason analysis, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977). Nothing about quick look doctrine, which addresses only whether evidence of relevant market and market power is unnecessary, alters that elemental proposition.

STATEMENT OF THE CASE

1. Petitioners Deutscher Tennis Bund or German Tennis Federation (GTF) and Qatar Tennis Federation (QTF) are nonprofit organizations that promote tennis in their respective countries, including by owning and operating men's professional tennis tournaments.[1]

Respondent ATP Tour, Inc. is a nonprofit corporation whose membership comprises the vast majority of top men's professional tennis players and tournaments. Petitioner Federations are ATP tournament members.

2. This action involves adoption by ATP and certain directors and officers (individual respondents) of a plan restructuring men's professional tennis called the "Brave New World," which went into effect January 1, 2009. The Federations' suit claimed the plan violated Sherman Act §§ 1 and 2, and fiduciary duties to the Federations. The § 1 claim, at issue before the Third Circuit and on this Petition, charged that respondents (including ATP tournament members favored by the Brave New World plan) conspired and combined to control the supply of top men's professional tennis players' services, creating a favored class of tournaments in which top-player participation was mandated. This eliminated need for those tournaments to compete for such player services, and severely impeded the ability of other tournaments (such as those owned by the Federations) to do so.

---

1. Petitioner Rothenbaum Sports GmbH, an entity owned by GTF and QTF, owns the professional tennis tournament GTF has long operated in Hamburg.

As the Third Circuit recognized, "[p]rofessional sports teams or tournaments always have an interest in obtaining the best players possible" (citing *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996)), and "[t]he record in this case indicates that the individual tennis tournaments traditionally compete for player talent." App. 32a-33a. But in adopting their Brave New World plan, respondents decided to "channel" top players to favored ATP tournament members: "The Brave New World plan's objective was to increase the value and appeal of top-tier tournaments by channeling top players to compete in them." App. 6a.

This was achieved *via* "carrots" and "sticks" that would cause top players to participate in plan-favored events. The "sticks" punished players who chose not to participate in such events and/or to play in competing tournaments:

> Notably, the Brave New World plan also amended ATP rules so that qualifying players were required, under threat of sanctions – suspension, loss of ranking, and loss of ability to earn ranking points – to play all [ATP] Tier I events, at least four Tier II events, and at least two Tier III events. Further, all qualifying players were also required to play in the year-end [ATP-owned] Tennis Masters Cup championship. In addition, the Brave New World plan imposed a "Special Events" rule on the top 50 players, prohibiting them from participating in any non-ATP, non-Grand Slam events during the weeks of and surrounding ATP events.

App. 7a. On the "carrots" side, the plan "monetized" top-player participation in plan-favored events *via* increased financial rewards: "In turn, ATP increased the tournaments' minimum prize money levels to benefit the players." *Id.*

Respondents justified the Brave New World not by claiming it had procompetitive benefits in the player-services market in which tournaments compete with each other, but rather by arguing it improved ATP's position *vis-à-vis* other spectator sports and other entertainment generally. See App. 5a ("According to ATP, this restructuring was necessitated [because] ATP was losing ground in the sports and entertainment markets"); *id.* ("By strengthening its top-tier events and simplifying its tournament structure, ATP believed it could better compete with other sports events and other forms of entertainment"); App. 8a ("ATP designed the Brave New World plan as a comprehensive plan to address the perceived decline of ATP in the sports and entertainment markets").

3. In the jury trial below, the district court ruled for respondents and against the Federations on two legal issues critical to the § 1 claim.

First, the court instructed the jury over the Federations' objection that it could decide if ATP and tournament members favored by the Brave New World were a "single entity" incapable of conspiring for § 1 purposes. Respondents said that as a sports league and its members, they were a "single entity" under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984). The court rejected the Federations' claim

that respondents were not a "single entity" in creating their Brave New World, which eliminated player-services competition among economically independent tournaments. App. 46a-49a.

After the court gave respondents' instruction on this issue, the jury returned a special verdict form finding that ATP and its plan-favored member tournaments were a "single entity" incapable of conspiring in violation of § 1. Based on this, the Federations' § 1 claim failed without need for the jury to decide any other question. App. 11a.

Second, the district court refused to hold that respondents' facially anticompetitive conduct merited "quick look" analysis. The Federations argued that, because the Brave New World plan was a horizontal restraint in the player-services market among plan-favored ATP tournaments that competed for such services, "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect." *California Dental*, 526 U.S. at 770. As the anticompetitive impact of the plan was facially apparent, the Federations asked that the jury be instructed that its task on the § 1 claim was to weigh that anticompetitive impact against any legitimate procompetitive justifications proved by respondents. The court refused the Federations' tendered instruction. App. 49a-50a.

The jury finding that respondents were a "single entity" made it unnecessary for it to determine if the Federations had proved a relevant market on their § 1 claim (proof the Federations contended was not needed

under this Court's "quick look" doctrine). However, in finding against petitioners on the § 2 monopolization claim (not at issue on appeal), the jury found a relevant market had not been shown. App. 11a.

The district court entered judgment for respondents on the Federations' § 1 and other claims. App. 42a.

4. The Third Circuit affirmed. It acknowledged that "the agreement among the ATP's tournament members in the Brave New World Plan might have deprived the marketplace of potential competition," because "[p]rofessional sports teams or tournaments always have an interest in obtaining the best players possible" and "[t]he record in this case indicates that the individual tennis tournaments traditionally compete for player talent." App. 32a-33a. But despite this anticompetitive impact on the player-services market, the panel held "quick look" analysis was inappropriate because "the definition of the relevant market was one of the most contested issues at trial," and "'the contours of the market' here are not 'sufficiently well known or defined to permit the court to ascertain without the aid of extensive market analysis whether the challenged practice impairs competition.'" App. 20a-21a (citation omitted).

The Third Circuit also held that, even under "quick look" analysis, the § 1 claim would fail. In the panel's view, if defendant proffers procompetitive rationales for facially anticompetitive conduct, "the 'quick look' presumption [of anticompetitive impact] disappears" and the case reverts to what the court called "full-scale rule of reason analysis." App. 23a. Here, the Third

Circuit treated respondents' claims of procompetitive effects in the sports and entertainment markets as legally cognizable justifications for their horizontal restraint in the market for player services among competing ATP tournaments:

> ATP proffered evidence of procompetitive justifications for the Brave New World plan. The plan was developed to make the ATP Tour more competitive with other spectator sports and entertainment products by improving the quality and consistency of its top-tier events.

App. 22a.

Believing procompetitive justifications made quick look analysis "disappear[ ]" and required "full-scale rule of reason analysis," the Third Circuit reasoned that the Federations' § 1 claims failed because they had "failed to prove the relevant market." App. 23a. In other words, the panel believed that (a) what it called "full-scale rule of reason analysis" was the "either-or" alternative to "quick look" analysis; (b) even in a quick look case, this "full-scale analysis" alternative became obligatory if defendant proffered procompetitive justifications for facially anticompetitive conduct; and (c) under full-scale analysis, plaintiff was then required to prove the "relevant market" that the quick look presumption had obviated. Applying this chain of reasoning, the panel held the jury's finding that a relevant market was not proved on the § 2 claim also established that no relevant market was proven for purposes of the Federations' § 1 claim. App. 23a.

The Third Circuit also rejected the possibility of a factfinder role in quick look cases. The Federations contended the factfinder "balance[s] the proffered procompetitive justification against the presumed anticompetitive harm" – *i.e.*, that "under 'quick look,' the jury's inquiry 'starts from the premise – already determined by the court as a matter of law – that the restraint's anticompetitive effect is evident without need for detailed market analysis, requiring no proof by plaintiff of market definition or power.'" App. 22a-23a (quoting Federations' brief). The panel said this "misapprehend[s] the reasonableness analysis": "'The application of the quick look analysis is a question of law to be determined by the court,' and therefore the concept of 'quick look' has no application to jury inquiry." App. 23a (citation omitted).

Finally, the Third Circuit concluded that any error in allowing the jury to find respondents acted as a "single entity" in adopting the Brave New World plan was harmless. The panel recognized that under this Court's *American Needle* decision (rendered after oral argument below) it was dubious that ATP and plan-favored tournament members acted as a single entity in creating their Brave New World:

> The record in this case indicates that the individual tennis tournaments traditionally compete for player talent. An agreement restricting this competition should not necessarily be immune from § 1 scrutiny merely because the tournaments cooperate in various aspects of producing the ATP Tour. "The justification for cooperation is not relevant to whether that cooperation is

> concerted or independent action." *Am. Needle*, [130 S. Ct.] at 2214. The necessity of cooperation does not "transform[ ] concerted action into independent action." *Id.* "The mere fact that the teams operate jointly in some sense does not mean that they are immune." *Id.*

App. 32a-33a. Nonetheless, the panel believed the jury's relevant market finding on the § 2 claim mooted any single entity error on the § 1 claim:

> [W]e need not decide whether the single enterprise instruction was given in error. As noted, even if the jury had found concerted action, the Federations' antitrust claims still fail because they did not satisfy their burden of proving a relevant market.

App. 33a.

REASONS FOR GRANTING THE PETITION

I. The Third Circuit Allowed Anticompetitive Impact In One Market To Be Justified By Claimed Benefits In Another, Contravening This Court's Authority And Conflicting With Decisions Of Other Circuits.

As shown in Part II, the Third Circuit misperceived and misapplied this Court's cases on quick look review of facially anticompetitive conduct, rendering that doctrine a practical nullity and yielding confusion and circuit conflict in an important antitrust arena. But the decision's analysis also contravened and created circuit

conflict on an elemental principle of this Court's antitrust jurisprudence long predating quick look doctrine – namely, that anticompetitive conduct in one market may not be justified by claimed benefits in a different market.

United States v. Topco Associates, 405 U.S. 596 (1972), is instructive. There, members of a cooperative association comprising economically independent small and regional supermarket chains established "exclusive territorial areas," with all members agreeing not to compete in sale of association-brand products within another member's territory. 405 U.S. at 598-603. The Court held "the restraint in this case is a horizontal one, and, therefore a per se violation of § 1." *Id.* at 608. It then rejected the argument that this anticompetitive conduct could be justified by its claimed procompetitive effects in a different market:

> [T]he Court has consistently rejected the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition. [collecting cases] . . .
>
> The District Court determined that by limiting the freedom of its individual members to compete with each other, Topco was doing a greater good by fostering competition between members and other large supermarket chains. But the fallacy in this is that Topco has no authority under the Sherman Act to determine the respective values of competition in various sectors of the

> economy. On the contrary, the Sherman Act gives to each Topco member and to each prospective member the right to ascertain for itself whether or not competition with other supermarket chains is more desirable than competition in the sale of Topco-brand products.

Id. at 610-11.

Likewise, the Court has rejected the theory that an anticompetitive bank merger could be justified by arguing "that the increased lending limit of the resulting bank will enable it to compete with the large out-of-state bank, particularly the New York banks, for very large loans:"

> If anticompetitive effects in one market could be justified by procompetitive consequences in another, the logical upshot would be that every firm in an industry could, without violating § 7, embark on a series of mergers that would make it in the end as large as the industry leader.

United States v. Phila. Nat'l Bank, 374 U.S. 321, 370 (1963).

The law that anticompetitive conduct in one market cannot be justified by alleged procompetitive effects in another also rests on the Court's recognition that the judiciary lacks the authority and competence to "weigh" competitive benefits and detriments across different economic sectors:

> If a decision is to be make to sacrifice competition in one portion of the economy for greater competition in another portion this too is a decision that must be made by the Congress and not by private forces or by the courts. Private forces are too keenly aware of their own interests in making such decisions and the courts are ill-equipped and ill-situated for such decisionmaking. To analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions, and to make the delicate judgment on the relative values to society of competitive areas of the economy, the judgment of the elected representatives of the people is required.

Topco, 405 U.S. at 611-12.

Philadelphia National Bank is identical:

> [An anticompetitive merger] is not saved because, on some ultimate reckoning of social or economic debits and credits, it may be deemed beneficial. A value choice of such magnitude is beyond the ordinary limits of judicial competence, and in any event has been made for us by Congress when it enacted the amended § 7.

374 U.S. at 371.

The decision below overlooked *Topco* and *Philadelphia National Bank*, holding instead that claimed competitive benefits in the "sports and entertainment markets" constituted procompetitive justifications for respondents' horizontal restraint on competition among ATP tournaments in the player-services market. This is elemental error.

Competition for player services is a self-evident feature of professional sports endeavors, recognized by this Court and others – including the Third Circuit here. See Part II, *infra* at 25-26; App. 32a ("Professional sports teams or tournaments always have an interest in obtaining the best players possible"); App. 32a-33a ("The record in this case indicates that the individual tennis tournaments traditionally compete for player talent"). Respondents' Brave New World plan is a classic horizontal restraint – an agreement among horizontal competitors (plan-favored tournaments) that eliminates their need to compete for top-player services, and severely impedes other tournaments' ability to do so. See Part II, *infra* at 27-28. The decision acknowledged the anticompetitive impact in that market. App. 32a ("the agreement among the ATP's tournament members in the Brave New World Plan might have deprived the marketplace of potential competition"); App. 33a ("An agreement restricting this competition [among tournaments for player talent] should not necessarily be immune from § 1 scrutiny merely because the tournaments cooperate in various aspects of producing the ATP Tour").

Despite this acknowledged anticompetitive impact, the Third Circuit held that claimed competitive benefits

in "the sports and entertainment markets" were procompetitive justifications for respondents' horizontal restraint in the player-services market. As the decision accurately reflects, respondents' justifying rationales for the Brave New World related exclusively to its claimed impact in those other markets. See App. 5a ("According to ATP, this restructuring was necessitated [because] ATP was losing ground in the sports and entertainment markets"); *id.* ("By strengthening its top-tier events and simplifying its tournament structure, ATP believed it could better compete with other sports events and other forms of entertainment"); App. 8a ("In sum, ATP designed the Brave New World plan as a comprehensive plan to address the perceived decline of ATP in the sports and entertainment markets").

Claimed benefits in "sports and entertainment markets" were also the sole bases for holding respondents had proffered procompetitive justifications that (in the decision's view of "quick look" doctrine) made the presumption of anticompetitive impact in the player-services market "disappear[ ]:"

> ATP proffered evidence of procompetitive justifications for the Brave New World plan. The plan was developed to make the ATP Tour more competitive with other spectator sports and entertainment products by improving the quality and consistency of its top-tier events. The modifications to the tour calendar, increase of investment, higher payments to players, and expanded geographic reach were all designed to improve the Tour. Such rules and regulations can be procompetitive where

> they enhance the "character and quality of the 'product.'"

App. 22a (quoting *Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 102 (1984)).

As shown in Part II, this is incorrect under *NCAA* and the Court's other "quick look" cases. But it also directly contravenes *Topco* and *Philadelphia National Bank*. Respondents have "no authority under the Sherman Act to determine the respective values of competition in various sectors of the economy." *Topco*, 405 U.S. at 610-11. A decision "to sacrifice competition" in the player-services market "for greater competition" in the sports and entertainment markets "must be made by the Congress and not by private forces or by the courts." *Id.* at 611. Respondents are private actors who "are too keenly aware of their own interests in making such decisions." *Id.* The court below was "ill-equipped and ill-situated for such decisionmaking," *id.*, which was "beyond the ordinary limits of judicial competence," *Philadelphia National Bank*, 374 U.S. at 371.

The Third Circuit view also conflicts with decisions of other courts of appeals that anticompetitive impact in one market may not be justified by claimed benefits in another. See, *e.g.*, *Smith v. Pro Football, Inc.*, 593 F.2d 1183, 1196 (D.C. Cir. 1978); see also *Sullivan v. NFL*, 34 F.3d 1091, 1111-13 & n.9 (1st Cir. 1994) (noting "it seems improper to validate a practice that is decidedly in restraint of trade simply because the practice produces some unrelated benefits to competition in another market;" but saying "waters are muddied" by *NCAA*, in which *Sullivan* believed "it is

impossible to tell whether the Court was consciously applying the rule of reason to include a broad area of procompetitive benefits in a variety of markets, or whether the Court was simply not being very careful and inadvertently extended the rule of reason past its proper scope"). This underscores the need for renewed guidance from this Court.

II. The Third Circuit Fundamentally Misunderstood And Misapplied This Court's "Quick Look" Jurisprudence, Creating And Highlighting Conflicts Among The Courts of Appeals.

The Court's "quick look" doctrine – which applies when challenged conduct, while not illegal *per se*, has self-evident anticompetitive impact – developed in three decisions over an eight-year period: *Nat'l Soc. of Prof'l Eng'rs v. United States*, 435 U.S. 679 (1978); *NCAA v. Bd. of Regents*, 468 U.S. 85 (1984); and *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447 (1986):

> In [*NCAA*], we held that a "naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis." [468 U.S.], at 110. Elsewhere, we held that "no elaborate industry analysis is required to demonstrate the anticompetitive character of" horizontal agreements among competitors to refuse to discuss prices, [*Professional Engineers*], 435 U.S.[, at 692], or to withhold a particular desired service, [*Indiana Dentists*], 476 U.S.[, at 459] (quoting [*Professional Engineers*], *supra* at 692). In each of these

> cases, which have formed the basis for what has come to be called abbreviated or "quick-look" analysis under the rule of reason, an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.

Cal. Dental Ass'n v. FTC, 526 U.S. 756, 769-70 (1999).

The key features of quick look analysis are straightforward. First, if challenged conduct has obvious anticompetitive impact, plaintiff need not prove a relevant market in which defendant has power: "As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output." *NCAA*, 468 U.S. at 109. Examples include a "league's television plan [that] expressly limited output" and "fixed a minimum price," *California Dental*, 526 U.S. at 770 (describing *NCAA*, 468 U.S. at 99-100); an association's imposing on its members "'an absolute ban on competitive bidding,'" *id.* (quoting *Professional Engineers*, 435 U.S. at 692): and "'a horizontal agreement among the participating dentists to withhold from their customers'" a desired service, *id.* (quoting *Indiana Dentists*, 476 U.S. at 459).

Second, defendant must produce evidence of the conduct's procompetitive impact. The "hallmarks of anticompetitive behavior" that trigger quick look analysis "place upon [defendant] a heavy burden of establishing an affirmative defense which competitively justifies [the] apparent deviation from the operations

of a free market." *NCAA*, 468 U.S. at 113. "[U]nless the defendant comes forward with some plausible (and legally cognizable) competitive justification for the restraint, [it is] summarily condemned." *Polygram Holding, Inc. v. FTC*, 416 F.3d 29, 36 (D.C. Cir. 2005); *accord Chi. Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667, 674 (7th Cir. 1992) (absent "sound justification, the court condemns the practice without ado"). If defendant offers evidence of procompetitive impact, the factfinder weighs anticompetitive and procompetitive effects under the rule of reason.

The Third Circuit held quick look analysis was inappropriate because "the definition of the relevant market was one of the most contested issues at trial," and "'the contours of the market' here are not 'sufficiently well known or defined to permit the court to ascertain without the aid of extensive market analysis whether the challenged practice impairs competition.'" App. 20a-21a (citation omitted). It then held that even under quick look analysis, respondents' offer of procompetitve justifications made "the 'quick look' presumption disappear[ ]," thereby triggering what the court called "full-scale rule of reason analysis" – under which the Federations' claim failed because they "failed to prove the relevant market." App. 23a. Consistent with its view that "quick look" and "full-scale rule of reason analysis" were either-or choices, the decision also held quick look analysis was a legal exercise exclusively for the court, in which the factfinder has no role: "'The application of the quick look analysis is a question of law to be determined by the court,' and therefore the concept of 'quick look' has no application to jury inquiry." *Id.* (citation omitted).

Each holding misunderstands and misapplies this Court's quick look jurisprudence, and creates or highlights conflicts among the courts of appeals.

A. The Decision's View That "Relevant Market" Disputes Preclude Quick Look Analysis Ignored The Player-Services Market In Professional Sports, Recognized By This Court And Others, And The Self-Evident Anticompetitive Impact Of ATP's Horizontal Restraint In That Market.

"[A]n observer with even a rudimentary understanding of economics," *California Dental*, 526 U.S. at 770 – or, as accurately if more colloquially, any high school graduate who watches ESPN – knows that competition for top-player services is an inherent, critical aspect of professional sports endeavors. This is true in league sports (Major League Baseball, the NFL, the NBA, the NHL) where each team competes for services of star players with other teams, with which it also competes on the field or in the arena. It is equally true in professional tennis, where economically independent tournaments compete to secure participation of top players.

This is why antitrust cases involving restrictions on player-services markets (*e.g.*, NFL or NBA drafts) routinely hold such conduct is anticompetitive. See *Smith v. Pro Football*, 593 F.2d at 1183-86 (NFL draft was "unreasonable restraint of trade" and "undeniably anticompetitive both in its purpose and in its effect," which "was to 'suppress and even destroy competition' in the market for player services") (*quoting Chi. Bd. of*

Trade v. United States, 246 U.S. 231, 238 (1918)); *Drysdale v. Florida Team Tennis, Inc.*, 410 F. Supp. 843, 848 (W.D. Pa. 1976) (World Team Tennis draft "would simply stifle any competition between [league] franchisees for obtaining players' services"); *Kapp v. NFL*, 390 F. Supp. 73, 82 (N.D. Cal. 1974) (NFL draft was "patently unreasonable"), *appeal on issue dismissed as moot*, 586 F.2d 644 (9th Cir. 1978); *Robertson v. NBA*, 389 F. Supp. 867, 893 (S.D.N.Y. 1975) (NBA "draft system and perpetual reserve system" binding player to specific team "are readily susceptible to [antitrust] condemnation").

The competitive player-services market is also the self-evident predicate for applicability to professional sports endeavors of statutory and nonstatutory labor exemptions from antitrust liability. See *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) (league's imposing fixed salary on developmental players fell within scope of nonstatutory labor exemption from antitrust liability); *Mackey v. NFL*, 543 F.2d 606, 615 (8th Cir. 1976) ("labor exemption pre-supposes a violation of the antitrust laws").

Elsewhere in its opinion the Third Circuit acknowledged existence of the player-services market here. App. 32a ("Professional sports teams or tournaments always have an interest in obtaining the best players possible" (citing *Brown v. Pro Football*)). The court acknowledged as well that this was documented by the evidence. App. 32a-33a ("The record in this case indicates that the individual tennis tournaments traditionally compete for player talent").

The decision also did not dispute the Brave New World plan's anticompetitive impact. App. 32a ("[T]he agreement among the ATPs tournament members in the Brave New World Plan might have deprived the marketplace of potential competition"). The plan's explicit purpose is to channel top players to favored tournaments, thereby eliminating need for these economically independent entities to compete with each other for player services, and severely limiting ability of nonfavored tournaments to engage in that competition. The decision repeatedly stated this obvious point. App. 2a ("The redesigned format channeled more top-tier players to the top-tier ATP tournaments"); App. 6a ("The Brave New World plan's objective was to increase the value and appeal of top-tier tournaments by channeling top players to compete in them").

The decision also detailed the "sticks" and "carrots" used by the plan to accomplish this objective:

> Notably, the Brave New World plan also amended ATP rules so that qualifying players were required, under threat of sanctions – suspension, loss of ranking, and loss of ability to earn ranking points – to play all Tier I events, at least four Tier II events, and at least two Tier III events. Further, all qualifying players were also required to play in the year-end [ATP-owned] Tennis Masters Cup championship. In addition, the Brave New World plan imposed a "Special Events" rule on the top 50 players, prohibiting them from participating in any non-ATP, non-Grand Slam events during the weeks of and

> surrounding ATP events. . . . In turn, ATP increased the tournaments' minimum prize money levels to benefit the players.

App. 7a.

This is classic horizontal market division – an agreement among some competitors to divvy-up services of leading players among favored tournaments to the exclusion of other competitors. Such conduct is typically illegal *per se*. *E.g.*, *Topco*, 405 U.S. at 602-03, 607-08 (agreement among cooperative association members "dividing markets" into "exclusive territorial areas" where members would not compete with each other was "horizontal [restraint], and, therefore a per se violation of § 1"). Even assuming any circumstances rescue respondents' plan from *per se* condemnation, the anticompetitive impact of horizontal market division remains self-evident. "[N]o elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Professional Engineers*, 435 U.S. at 692. "[A]n observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect," *California Dental*, 526 U.S. at 770, "even in the absence of a detailed market analysis," *NCAA*, 468 U.S. at 110.

In addition to overlooking the self-evident anticompetitive impact of respondents' horizontal restraint, the Third Circuit view that disputes about "definition of the relevant market" obviate quick look review (App. 20a) misperceived the "market dispute." The panel thereby misperceived as well the pertinent market that triggers quick look analysis.

Any claim that no "player-services market" exists is untenable, given recognition of that obvious market in professional sports enterprises by this Court and others (including the Third Circuit in acknowledging that market and its record documentation). See *supra* at 25-26. The market dispute here centered instead on respondents' theory that the "relevant" markets were "really" the spectator sports and entertainment markets, rather than the player-services market in which tournaments compete with one another. In respondents' view, claimed procompetitive impact in these entertainment markets justified their horizontal restraint of competition in the player-services market (or rendered that market not the "relevant" one).

As shown in Part I, a defendant may not justify anticompetitive practices in one market by pointing to supposed procompetitive impact in another. But the Third Circuit's "relevant market" reasoning sanctions precisely such impermissible "justification" in the quick look context: It allows defendant to evade quick look review of facially anticompetitive conduct in one market (here, horizontal allocation of the player-services market) by arguing that different markets (here, sports and entertainment markets) are really the "relevant" ones. This overlooks and undermines *Topco* and *Philadelphia National Bank*.

The panel reasoning is also at odds with this Court's recent explication of "single entity" doctrine. As *American Needle, Inc. v. NFL* shows, the fact that members of a professional sports league may be a single entity for § 1 purposes when engaged in some activities in some markets (*e.g.*, "production and scheduling of

games" in the spectator sports and entertainment markets) does not make members a single entity when engaged in different activities in other markets (*e.g.*, "when it comes to the marketing of the team's individually owned intellectual property"). 560 U.S. ___, 130 S. Ct. 2201, 2216-17 (2010). But the "relevant market" reasoning below sanctions precisely such impermissible conflating of different markets in quick look cases: It allows defendant to evade quick look review of facially anticompetitive conduct in a market where members of a sports organization do *not* act as single entity (here, horizontal allocation of the player-services market in which tournaments compete with each other) by arguing that ATP members supposedly do need to act as a single entity in different markets (here, sports and entertainment markets). This overlooks and undermines *American Needle*.

The Third Circuit made the identical errors, including misperceiving the "relevant market" dispute, in holding that the Federations' not "proving a relevant market" made it unnecessary to decide if the district court erred in allowing the jury to view ATP tournaments as a single entity. See App. 33a. Yet this holding came immediately after the panel explicitly noted that "the individual [ATP] tennis tournaments traditionally compete for player talent," and "[a]n agreement restricting this competition should not necessarily be immune from § 1 scrutiny merely because the tournaments cooperate in various aspects of producing the ATP Tour." *Id.* This shows that the Third Circuit's "relevant market" rationale for allowing respondents' horizontal restraint to escape quick look scrutiny is at odds not only with *American Needle*, but

also with the decision's own recognition of the realities of the player-services market and the anticompetitive impact of the Brave New World plan.

B. The Decision's View That Quick Look "Disappears" If Defendant Offers Justifications For Facially Anticompetitive Conduct, Shifting the Burden To Plaintiff To Prove Anticompetitive Impact In A Relevant Market, Contravenes This Court's Quick Look Jurisprudence And Conflicts With Decisions Of Other Courts Of Appeals.

The Third Circuit also held that once defendant proffers procompetitive rationales for facially anticompetitive conduct, "the 'quick look' presumption disappears" and the case reverts to "full-scale rule of reason" analysis – including requiring plaintiff to start at square one and prove a relevant market in which defendant's conduct has anticompetitive impact. App. 23a. This fundamentally distorts and misapplies this Court's jurisprudence, stripping it of practical import, and conflicts with decisions of other courts of appeals.

First, the Third Circuit misperceived the reason for market analysis. The questions "What is the market?" and "Does defendant have market power" have no independent significance. Rather, "the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition." *Indiana Dentists*, 476 U.S. at 460. The "inquiry into market power . . . is but a 'surrogate for detrimental effects'" on competition. *Id.* at 461 (citation omitted). If

anticompetitive impact is evident, there is no need to "prove" a market in which defendant has power.

This, of course, is the core premise of quick look doctrine. As shown, quick look analysis is triggered by anticompetitive impact that is evident to "an observer with even a rudimentary understanding of economics." *California Dental*, 526 U.S. at 770. That is why "[a]s a matter of law, the absence of proof of market power does not justify a naked restriction on price or output." *NCAA*, 468 U.S. at 109. That is why such a restriction requires defendant to prove "some competitive justification even in the absence of a detailed market analysis." *Id.* at 110.

That is also why defendant's proffer of such justifications does not mean plaintiff must now go back and "prove," under a court's view of "full-scale" rule of reason analysis, a market in which defendant's conduct has anticompetitive impact. Defendant's justifications do not alter that the challenged practice (*e.g.*, the horizontal restraint here) is facially anticompetitive. Since demonstrating anticompetitive impact is "the purpose of the inquiries into market definition and market power," *Indiana Dentists*, 476 U.S. at 460, there is no legal or logical basis to revive those market inquiries when anticompetitive impact is evident – which it is by definition in a case that warrants quick look review.

If defendant proffers procompetitive justifications for facially anticompetitive conduct, the factfinder moves to rule of reason balancing of anticompetitive and procompetitive effects. Nothing in *Professional*

Engineers, *NCAA*, *Indiana Dentists* or *California Dental* supports the novel proposition, irreconcilable with the premise of "quick look" doctrine, that instead the burden now shifts to plaintiff to prove anticompetitive impact in a relevant market in which defendant possesses market power.

The Third Circuit's mistaken contrary view also creates and highlights conflicts among the courts of appeals in two critical respects. First, other circuits correctly hold, consistent with this Court's cases, that relevant market and market power inquiries have no role in quick look cases. See *Polygram*, 416 F.3d at 36 (D.C. Cir.) (rejecting argument that FTC's quick look analysis erred because "'proof of actual anticompetitive effect (or market power as its surrogate) is required in *any* Rule of Reason case'" (quoting brief; original emphasis); *Cal. ex rel. Brown v. Safeway, Inc.*, ___ F.3d ___, 2010 WL 3222187, at *15 (9th Cir. 2010) (rejecting argument in quick look case that State "lack[ed] empirical evidence to demonstrate that the effects of [defendants'] agreement were anticompetitive in practice;" when "anticompetitive nature of the likely effects of an agreement is, as a theoretical matter, 'obvious,' it is not necessary for a plaintiff to provide empirical evidence demonstrating anti-competitive consequences"); *Law v. Nat'l Collegiate Athletic Ass'n*, 134 F.3d 1010, 1019-20 (10th Cir. 1998) (rejecting argument in quick look case that "district court erred by failing to define the relevant market and by failing to find that the NCAA possesses power in that market"; this "misapprehends the purpose in antitrust law of market definition, which is not an end unto itself but rather exists to illuminate a practice's effect on

competition"); see also *Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440, 1448 (9th Cir. 1988) (rejecting claim, in case where jury found challenged conduct "had actual detrimental effects on competition," that proper relevant market had not been proven; "[d]efining the market is not the aim of antitrust law; it merely aids the search for competitive injury"; "market definition and market power are merely tools designed to uncover competitive harm").

Second, the Third Circuit's shifting the burden of proving anticompetitive impact to plaintiff when defendant proffers procompetitive justifications highlights direct circuit conflict on another key "quick look" issue. This Court holds that when anticompetitive impact is apparent, defendant has "a heavy burden of establishing an affirmative defense which competitively justifies" the conduct. *NCAA*, 468 U.S. at 113. Despite this clear instruction, courts of appeals are split on this issue. *Compare N. Tex. Specialty Physicians v. FTC*, 528 F.3d 346, 352 (5th Cir. 2008) ("burden remains on the challenger" to show conduct does not have net procompetitive impact); App. 21a-22a (citing *Specialty Physicians*), *with Safeway*, 2010 WL 3222187, at *17 (9th Cir.) ("burden of proof is shifted to the defendant"); *Law*, 134 F.3d at 1021 (10th Cir.) ("disagree[ing] with the Fifth Circuit's allocation of the burden of proof"; "burden shifts to the defendant to justify the restraint").

The decision below also renders quick look doctrine a practical nullity. It will be a rare antitrust defendant who cannot advance some procompetitive rationale (likely supported by an expert) for a challenged practice.

This is particularly so if, as the decision mistakenly allows, defendant may point to supposed positive impact in different markets, which the defendant argues (again with expert support) are really "relevant." Under the reasoning below, quick look becomes a meaningless exercise: After plaintiff shows facially anticompetitive conduct warrants application of quick look – whose premise is that market proof is not required when anticompetitive impact is apparent – quick look then "disappears" if defendant proffers procompetitive rationales; and plaintiff's case then fails absent "market" evidence that quick look doctrine was supposed to render unnecessary.

The Third Circuit's own precedent recognizes that such reasoning vitiates the quick look doctrine. See *United States v. Brown Univ.*, 5 F.3d 658, 673 (3rd Cir. 1993) (rejecting argument that quick look analysis is appropriate "only when evidence establishes that 'the challenged practice . . . manifestly has an adverse effect on price, output, or quality'" (quoting brief); demanding "proof of actual adverse effects generally will require the elaborate, threshold industry analysis that an abbreviated inquiry is designed to obviate"). The decision below threatens precisely that result.

C. The Decision Below Also Misperceives And Creates Confusion On Other Critical Features Of This Court's Quick Look Doctrine.

The Third Circuit reasoning also misapprehends and misapplies this Court's jurisprudence in other critical respects.

First, holding that procompetitive justifications make quick look "disappear," thereby triggering the decision's view of "full-scale rule of reason analysis," mistakenly treats these as categorically separate forms of analysis between which an "either-or" choice must be made. This Court instructs otherwise. *E.g.*, *California Dental*, 526 U.S. at 781 ("What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint"); see *American Needle*, 130 S. Ct. at 2216-17.

Further, the decision's "either-or" view reflects a fundamental conceptual misunderstanding of quick look doctrine. "Rule of reason" balancing is not an "alternative" to quick look review; it involves instead a *different aspect* of antitrust analysis – and one that may apply in quick look cases just as in any other antitrust action not involving *per se* illegality. Again: Quick look doctrine addresses whether "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect," *California Dental*, 526 U.S. at 770, "even in the absence of a detailed market analysis," *NCAA*, 468 U.S. at 110. If so, the consequence is that plaintiff need not "prove" a relevant market in which defendant has market power – because such evidence has no purpose other than as a *means to show* anticompetitive impact. By definition, that demonstration is not needed in quick look cases, because the doctrine applies only if anticompetitive impact is facially apparent.

Hence, the sole aspect of antitrust analysis that is necessarily "abbreviated" in quick look cases involves

eliminating need for evidence of defendant's power in a relevant market. Rule of reason balancing by the factfinder will still occur if defendant proffers legally cognizable procompetitive justifications.

To be sure, analysis may be *further* "abbreviated" if a defendant advances no justification (in which case the conduct is "summarily condemned," *Polygram*, 416 F.3d at 36), or the court determines the justification is insufficient as a matter of law (*e.g.*, "is inconsistent with the basic policy of the Sherman Act," *NCAA*, 468 U.S. at 117, as when it is "based on the assumption that competition itself is unreasonable," *Professional Engineers*, 435 U.S. at 696). But if legally cognizable procompetitive justifications *are* advanced, rule of reason balancing occurs; and, depending on the justification evidence, it may be just as "full-scale" as in any other antitrust case. Again, analysis in quick look cases is "abbreviated" only by eliminating the preliminary inquiries about the market and market power – *i.e.*, what earlier Third Circuit case law correctly calls "the elaborate, threshold industry analysis that an abbreviated [quick look] inquiry is designed to obviate," *Brown University*, 5 F.3d at 673.

Finally, the decision confuses quick look law by mistakenly saying there is no jury role. The factfinder "balance[s] the proffered procompetitive justification against the presumed anticompetitive harm. . . . [U]nder 'quick look,' the jury's inquiry 'starts from the premise – already determined by the court as a matter of law – that the restraint's anticompetitive effect is evident without need for detailed market analysis.'" App. 22a-23a (quoting Federations' brief).

In rejecting this, the panel, not the Federations, "misapprehend[ed] the reasonableness analysis" (*id.*). Under the rule of reason, "the fact-finder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977). Nothing about quick look doctrine, which addresses whether need for market evidence is obviated, alters that elemental proposition.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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September 23, 2010

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT FILED JUNE 25, 2010

No. 08-4123

DEUTSCHER TENNIS BUND, German Tennis Federation; ROTHENBAUM SPORTS GMBH; QATAR TENNIS FEDERATION,

Appellants

v

ATP TOUR, INC.; ETIENNE DE VILLIERS; CHARLES PASARELL; GRAHAM PEARCE; JACCO ELTINGH; PERRY ROGERS; IGGY JOVANOVIC; JOHN DOE 7; JOHN DOE 8; JOHN DOE 9

On Appeal from the United States District Court
for the District of Delaware
D.C. Civil Action No. 07-cv-00178
(Honorable Gregory M. Sleet)

Argued: November 2, 2009

Filed: June 25, 2010

Before: SCIRICA, JORDAN and GREENBERG, *Circuit Judges.*

OPINION OF THE COURT

Appendix A

SCIRICA, *Circuit Judge.*

Men's professional tennis is a worldwide enterprise and every year, professional tennis players compete in various tournaments around the world. The principal men's professional tennis events are the four Grand Slams, the Davis Cup, and the ATP Tour, a worldwide professional tennis circuit organized by the Association of Tennis Professionals ("ATP"). This lawsuit arises out of the reorganization of the ATP Tour—known as the Brave New World plan—designed to revitalize its popularity, enabling it to better compete with other sports and entertainment events. The redesigned format channeled more top-tier players to the top-tier ATP tournaments and also redesignated the tier categories of some tournaments. The changes included a downgrade of the Hamburg, Germany tournament from the first tier to second tier status.

Dissatisfied with the downgrade, Hamburg tournament owners, the German and Qatar Tennis Federations (the "Federations"), sued ATP and certain of its officers and directors. The suit alleged that the Brave New World plan violated §§ 1 and 2 of the Sherman Act and that ATP's Directors breached fiduciary duties owed to the Federations. At trial, the District Court granted ATP's motions for judgment as a matter of law, dismissing the personal liability claims against the Directors for alleged antitrust violations and breach of fiduciary duty. The antitrust claims against ATP were submitted to a jury, which returned a verdict for ATP. The jury found the Federations failed to prove

ATP entered into a contract, combination, or conspiracy with any separate entity under § 1 of the Sherman Act, and did not establish a relevant product market under § 2.

The Federations appeal the jury verdict on § 1 of the Sherman Act, asserting the District Court erred in instructing the jury on a "single entity or enterprise defense," and in failing to instruct on the "quick look" mode of analysis. The Federations also appeal the judgment as a matter of law dismissing the antitrust claims against the Directors and the breach of duty of loyalty claim against Director Charles Pasarell. We will affirm the jury verdict on the Sherman Act § 1 claim based on the Federations' failure to prove the relevant market. Consequently, the question of personal director liability for antitrust claims is moot. We also will affirm the judgment as a matter of law dismissing the breach of duty of loyalty claim against Director Pasarell because neither he individually nor the ATP Board of Directors as a whole were materially self-interested when they voted in favor of the Brave New World plan.

I.

A.

Initially an association of the world's top men's professional tennis players, ATP evolved into a non-profit corporation consisting of a membership of men's professional tennis players and organizers of men's professional tennis tournaments. ATP operates a

worldwide tennis tour composed of the member tournaments, culminating in ATP's end-ofseason championship tournament, the Tennis Masters Cup.[1] Tennis players earn prize money and ATP ranking points through playing in ATP tournaments.

ATP ranking points determine each player's world ranking. The player rankings are important because they govern entry into and seeding in the Grand Slams[2] as well as ATP top-tier tournaments—the most important professional tennis tournaments. In turn, these tournaments award the most prize money and ranking points.

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1. In 2009, the Tennis Masters Cup was replaced by the Barclays ATP World Tour Finals.

2. The four Grand Slams (Australian Open, French Open, Wimbledon, and US Open) and the Davis Cup are not ATP tournaments and are regulated by the International Tennis Federation ("ITF"). But the Grand Slams have agreed to use ATP entry and ranking systems as the basis for determining entry and seeding of men's professional players into their events (Wimbledon has its own method of seeding calculation, which also takes into account players' past performances on grass over the previous two years, as well as their ATP ranking). In return, playing in the Grand Slams is mandatory for top ATP players. The Grand Slams also agreed not to organize a year-end event competing with the ATP's Tennis Masters Cup and ATP agreed not to combine the Masters Cup with the Women's Tennis Association's year-end event. Additionally, ATP has an agreement with ITF not to schedule ATP events against Davis Cup matches and to award ATP ranking points to Davis Cup tournaments.

Appendix A

ATP tournament members are divided into three categories: (1) Tier I (formerly "Masters Series"); (2) Tier II (formerly "International Series Gold"); (3) Tier III (formerly "International Series"). The categories of tournaments are distinguished by different levels of minimum prize money and different amounts of ranking points awarded on the basis of performance.

ATP is governed by a seven-member Board of Directors—three elected by tournament members (representing different geographic regions), three elected by player members, and a Chairman/President. ATP's Bylaws give the ATP Board discretion over the Tour's format.

In 2007, the Board voted to adopt several changes to the ATP Tour. According to ATP, this restructuring was necessitated by market changes and conditions: ATP was losing ground in the sports and entertainment markets. ATP's market research revealed that tennis fans wanted to see the top tennis players play against each other more often. ATP perceived that a growing decline in player participation in its top-tier events undermined its prestige and also the profile of the sport, leading to a decline in ticket sales and weakening the member tournaments' ability to secure television coverage and sponsorships. By strengthening its top-tier events and simplifying its tournament structure, ATP believed it could better compete with other sports events and other forms of entertainment, and also award more prize money to the players.

Appendix A

The Brave New World plan's objective was to increase the value and appeal of top-tier tournaments by channeling top players to compete in them. It also aimed to make the progression of the Tour easier for fans to follow by clearly communicating each tournament's tier and differentiating between the different tiers. To achieve these goals, the Brave New World plan altered the number of ranking points awarded to winning players in different tiers of tournaments. Tier I tournaments would award 1000 points instead of 500; Tier II tournaments would award 500 points instead of a range between 250 and 300; Tier III tournaments would award 250 points instead of a range between 175 and 250. Additionally, the Brave New World plan renamed the tournament tiers to correspond to the new ranking points system: Tier I became the "ATP World Tour Masters 1000"; Tier II became the "ATP World Tour 500"; and Tier III became the "ATP World Tour 250." The new ranking point distribution was designed in part as an incentive for the top tennis players to play the ATP top-tier events.

The Brave New World plan also reconfigured the Tour calendar to create geographic "swings" or "seasons" around the Grand Slams because of their size, prestige, history, and popularity, and their significantly greater amount of prize money. Thus, the Brave New World plan scheduled the top-tier ATP tournaments in the weeks before the Grand Slams with corresponding court surfaces—e.g., the Tier I tournament in Madrid, Spain on a clay surface was scheduled in the weeks before the French Open, a Grand Slam tournament also

on clay. According to ATP, scheduling their tournaments in this way attracts the top tennis players because of their desire to play on the same surface as the upcoming Grand Slam tournaments.

Notably, the Brave New World plan also amended ATP rules so that qualifying players were required, under threat of sanctions—suspension, loss of ranking, and loss of ability to earn ranking points—to play all Tier I events, at least four Tier II events, and at least two Tier III events. Further, all qualifying players were also required to play in the year-end Tennis Masters Cup championship. In addition, the Brave New World plan imposed a "Special Events" rule on the top 50 players, prohibiting them from participating in any non-ATP, non-Grand Slam events during the weeks of and surrounding ATP events. As noted, these changes were prompted by the decline in top player participation in ATP tournaments. In turn, ATP increased the tournaments' minimum prize money levels to benefit the players.

The Brave New World plan also spurred significant capital investments in facilities on the part of the tournaments—the Tier I and Tier II tournaments committed to approximately $ 864 million in capital investments. ATP undertook to create a more unified branding approach for the Tour and increased spending on promotion and marketing. It projected a $ 9 million marketing amount for 2009; previous budgets provided for only $ 800,000 in 2005 and 2006, and $ 5 million in 2007 and 2008. It also enhanced pooling for existing broadcast and digital media rights.

In sum, ATP designed the Brave New World plan as a comprehensive plan to address the perceived decline of ATP in the sports and entertainment markets. Concluding that fans desired a better structured Tour, featuring the best players playing against each other more often, ATP decided to simplify the Tour's format and to introduce regulations ensuring top player participation in ATP top-tier tournaments. Both ATP and the member tournaments committed to make investments to improve the quality of the Tour and promote it more effectively. The tournament members agreed to increase the prize money levels to compensate the players for agreeing to play in more top-tier events.

B.

Plaintiff German Tennis Federation promotes tennis in Germany and claims to be the world's largest national tennis federation, with approximately 1.7 million members. It stages an annual clay-court tournament in Hamburg, Germany. From 1990 to 2009, Hamburg tournament was a Tier I ATP tournament. Under the Brave New World plan, the Hamburg tournament was demoted to Tier II. The overall number of Tier I events remained at nine, with the addition of Shanghai, China.[3] In Tier II, the number of events was increased from nine to eleven. Plaintiff Qatar Tennis Federation was

3. The Federations contend that initially the Brave New World plan downgraded the Monte Carlo tournament to Tier II. But after Monte Carlo sued ATP, the parties settled with Monte Carlo having a hybrid status—it awards 1,000 ranking points but is not a mandatory tournament for players.

established in Qatar and has owned and operated a Tier III tournament in Doha, Qatar. It also owns a 25% stake in Hamburg tournament.

ATP contends the Hamburg tournament was demoted to Tier II because of its lack of significant investment, a decrease in attendance, unfavorable weather, and the decline of interest in tennis in Germany. ATP asserts that Hamburg tournament can succeed as a Tier II tournament.

C.

The Federations sued ATP alleging its adoption of the Brave New World plan violated §§ 1 and 2 of the Sherman Act and constituted a breach of the directors' fiduciary duties. The § 1 claim contended defendants conspired and combined to control the supply of top men's professional tennis players' services, establishing a favored class of tournaments in which top-player participation was mandatory, while precluding other tournaments from competing for such player services. Similarly, the § 2 claim alleged monopolization, attempt to monopolize, and conspiracy to monopolize the market for men's professional tennis players' services. Plaintiffs also asserted the ATP directors' adoption of the Brave New World plan breached their fiduciary duties of due care, loyalty, and good faith owed to the Federations.

The case was tried to a jury. At the close of the Federations' case, the District Court granted ATP's Fed. R. Civ. P. 50(a) motions for judgment as a matter of

law on all claims of personal liability against the Directors for alleged antitrust violations and breach of fiduciary duties. The court held that personal civil liability for antitrust violations is limited to participation in inherently unlawful acts. The court reasoned that under antitrust law, only *per se* violations are inherently unlawful. Finding that the alleged conduct could not be classified as classic *per se* violations, the court concluded that individual directors could not be liable. Addressing the breach of fiduciary duty claims against the Directors, it found the Federations failed to satisfy their initial burden of rebutting the presumption of the business judgment rule by showing the Directors violated any of their fiduciary duties. Accordingly, the District Court granted defendants' motion for judgment as a matter of law and dismissed all claims against the individual Directors.

The court then addressed proposed jury instructions. ATP submitted a proposed instruction on the "single entity or enterprise defense," stating that where entities "are commonly controlled or substantially integrated in their operations, they may be considered a 'single entity' or 'single enterprise' under the antitrust laws." The Federations objected, arguing that the instruction misstated the law and created a significant risk of confusion. Overruling the Federations' objections, the District Court gave the "single entity or enterprise defense" jury instruction as proposed by ATP. The court also considered whether the alleged restraints should be analyzed under "quick look" or the full rule of reason analysis. The court instructed the jury on the latter.

The jury returned a verdict for ATP on all claims. On the Sherman Act § 1 claim, it found the Federations did not prove ATP "entered into contract(s), combination(s) or conspiracy(ies) with any separate entity or entities." And on the Sherman Act § 2 claim, it found the Federations did not establish "the existence of any relevant product market(s) within any geographic market(s)."

The Federations filed a timely appeal of the Sherman Act § 1 claim against ATP and the Directors and the breach of fiduciary duty of loyalty claim against Director Charles Pasarell. Specifically, they contend the District Court erred by instructing the jury on the single entity defense, refusing to instruct the jury to apply "quick look" analysis, and granting defendants' motion for judgment as a matter of law on all claims against the individual Directors.[4]

II.

A.

Even assuming, *arguendo*, that the District Court erred in instructing the jury on the single entity defense, the Federations could not have succeeded on their Sherman Act § 1 claim because they failed to prove "the

4. The District Court had subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1337 based on claims alleged under Sherman Act, 15 U.S.C. §§ 1, 2 and 26, and under 28 U.S.C. § 1367 for supplemental state law claims. We have appellate jurisdiction under 28 U.S.C. § 1291.

existence of any relevant product market(s) within any geographic market(s)."[5] On the § 1 claim, the jury found no concerted action, so it did not reach the issue of relevant market. But on the Sherman Act § 2 claim, the jury did find the Federations failed to prove the existence of a relevant market.

The Federations contend that market definition and proof under § 2 differ from those under § 1, arguing that insufficient § 2 market proof does not establish insufficiency under § 1. In *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chem. Corp.*, 579 F.2d 20 (3d Cir. 1978), we said that "inquiries into the scope of competition under § 1 and § 2 are not precisely the same." *Id.* at 27 n.11. But in this case, the Federations asserted identical market definitions under §§ 1 and 2, as evidenced by the jury instructions.[6] *Cf. Tunis Bros.*

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5. Because the Federations did not carry their burden of proving a relevant market, we do not need to decide whether the District Court's single entity instruction was given in error. *See infra* Part III.

6. Giving the jury an overview of the rule of reason analysis for the purposes of § 1, the court stated: "[Y]ou must first determine whether Plaintiffs have carried their burden to show that any challenged restraint has resulted or is likely to result in a substantial harm to competition in a relevant product or geographic market(s)." App. 257 (Antitrust Jury Instruction 10—Antitrust Claims: Sherman Act Section 1—Rule of Reason—Overview). Explaining the requirement of proof of competitive harm, the court repeated: "[I]t is Plaintiffs' burden to show that the harm to competition occurred in an identified market, known as a 'relevant market.' There are two aspects to

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Co., Inc. v. Ford Motor Co., 952 F.2d 715, 724 n.3 (3d Cir. 1991) ("On this record, however, the plaintiffs do not present a sufficiently close factual issue to demarcate a distinction between product market definitions in section 1 and section 2 cases . . . ."). The jury verdict forms posed the same question regarding proof of the relevant market for the purposes of §§ 1 and 2 claims: "Have Plaintiffs proven by a preponderance of the evidence the existence of a relevant product market within a relevant geographic market?" App. 5, 10, 14,

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a relevant market. The first aspect is known as the relevant product market. The second aspect is known as the relevant geographic market." *Id.* at 258 (Antitrust Jury Instruction 11—Antitrust Claims: Sherman Act Section 1—Rule of Reason—Proof of Competitive Harm). Closely following the Model Jury Instructions, the court then instructed the jury on the substance of the relevant market inquiry. *Id.* at 261 (Antitrust Jury Instruction 13—Rule of Reason—Proof of Relevant Market). Later, describing the elements of the monopolization claim under § 2, the court explained: "Plaintiffs must prove by a preponderance of the evidence that the defendants had monopoly power in a relevant market." *Id.* at 272 (Antitrust Jury Instruction 21—Monopolization: Relevant Market—General). Using the nearly identical language as for the rule of reason instructions, the court continued: "There are two aspects you must consider in determining whether plaintiff has met its burden to prove the relevant market by a preponderance of the evidence. The first is the relevant product market; the second is the relevant geographic market." *Id.* No relevant market inquiry instructions specific to § 2 claims were proposed or provided. *See also* ABA Section of Antitrust Law, Model Jury Instructions in Civil Antitrust Cases A-6 (2005) (suggesting that the instruction describing the relevant market for the purposes of § 1 claim incorporate the § 2 relevant market instructions).

18. Therefore, the jury's conclusion that the Federations failed to prove a relevant market under § 2 is equally applicable to § 1 analysis. *See Fraser v. Major League Soccer, L.L.C.*, 284 F.3d 47, 59-61 (1st Cir. 2002) (affirming the judgment on § 1 claims based on the jury finding that plaintiffs failed to establish a relevant market under § 2).

B.

The Federations also contend they did not need to prove a relevant market because the District Court should have instructed the jury to conduct a "quick look" analysis, which does not require detailed market analysis. The Federations proposed a "quick look" jury instruction that the alleged restraints caused substantial harm to competition as a matter of law, so that the jury needed only consider "whether the restraint produces countervailing competitive benefits," and if so, "balance the competitive harm against the competitive benefit." App. 451. But the District Court reasoned that "[t]he evidence [presented] could perhaps be evidence of . . . antitrust violations, but only after one engaged in a detailed examination of the industry in question, and furthermore, only after taking the industry in question to be top-tier men's professional tennis, rather than, for example, professional sports or spectator events more generally." *Id.* at 25. The court concluded that "the plaintiffs failed to show evidence [of acts] that have no purpose except to stifle competition . . . ." *Id.* Accordingly, the court required the jury to analyze the alleged restraint under full rule of reason principles and

rejected the proposed "quick look" instruction.[7] Because even beneficial legitimate contracts or combinations restrain trade to some degree, § 1 of the Sherman Act has long been interpreted to prohibit only those contracts or combinations that are "unreasonably restrictive of competitive conditions." *Standard Oil Co. v. United States*, 221 U.S. 1, 58, 31 S. Ct. 502, 55 L. Ed. 619 (1911). Historically, "[t]hree general standards have emerged for determining whether a business combination unreasonably restraints trade under [§ 1]." *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993).

"Most restraints are analyzed under the traditional 'rule of reason.'" *Id.* (citing *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)); *see also Texaco Inc. v. Dagher*, 547 U.S. 1, 5, 126 S. Ct. 1276, 164 L. Ed. 2d 1 (2006) ("[T]his Court presumptively applies rule of reason analysis . . . ."); *State Oil v. Khan*, 522 U.S. 3, 10, 118 S. Ct. 275, 139 L. Ed. 2d 199 (1997). "The rule of reason requires the fact-finder to 'weigh [] all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Brown*, 5 F.3d at 668 (quoting GTE Sylvania, 433 U.S. at 49). The inquiry is whether the restraint at issue "is one that promotes competition or one that suppresses competition." *Nat'l Soc'y of Prof'l*

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7. The selection of a mode of antitrust analysis is a question of law over which we exercise plenary review. *See Arizona v. Maricopa County Med. Soc'y.*, 457 U.S. 332, 337 n.3, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)).

Eng'rs v. United States, 435 U.S. 679, 691, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978). "The plaintiff bears an initial burden under the rule of reason of showing that the alleged combination or agreement produced adverse, anticompetitive effects within the relevant product and geographic markets." *Brown*, 5 F.3d at 668. "The plaintiff may satisfy this burden by proving the existence of actual anticompetitive effects," or defendant's market power. *Id.* "If a plaintiff meets his initial burden of adducing adequate evidence of market power or actual anti-competitive effects, the burden shifts to the defendant to show that the challenged conduct promotes a sufficiently pro-competitive objective." *Id.* at 669. "To rebut, the plaintiff must demonstrate that the restraint is not reasonably necessary to achieve the stated objective." *Id.*

Some categories of restraints, such as horizontal price-fixing and market allocation agreements among competitors, "because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable." *Id.* (quoting *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958)). "Such 'plainly anticompetitive' agreements or practices are deemed to be 'illegal *per se*,'" *id.* (quoting *Prof'l Eng'rs*, 435 U.S. at 692), without an "elaborate inquiry into the reasonableness of a challenged business practice," *id.* (quoting *Arizona v. Maricopa County Med. Soc'y*, 457 U.S. 332, 343, 102 S. Ct. 2466, 73 L. Ed. 2d 48 (1982)). "*Per se* liability is reserved for only those agreements that are 'so plainly anticompetitive that no elaborate

study of the industry is needed to establish their illegality.'" *Dagher*, 547 U.S. at 5 (quoting *Prof'l Eng'rs*, 435 U.S. at 692); *see also State Oil Co.*, 522 U.S. at 10 ("*Per se* treatment is appropriate '[o]nce experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it.'" (quoting *Maricopa County Med. Soc'y*, 457 U.S. at 344)). Accordingly, the courts are reluctant "to adopt *per se* rules . . . where the economic impact of certain practices is not immediately obvious." *State Oil Co.*, 522 U.S. at 10 (internal quotation marks omitted).

"In addition to the traditional rule of reason and the per se rule, courts sometimes apply what amounts to abbreviated or 'quick look' rule of reason analysis." *Brown*, 5 F.3d at 669; *see NCAA v. Bd. of Regents*, 468 U.S. 85, 109 n.39, 104 S. Ct. 2948, 82 L. Ed. 2d 70. It is "an intermediate standard" and "applies in cases where *per se* condemnation is inappropriate but where no elaborate industry analysis is required to demonstrate the anticompetitve character of an inherently suspect restraint." *Brown*, 5 F.3d at 669 (internal quotation marks omitted); *see FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459, 106 S. Ct. 2009, 90 L. Ed. 2d 445 (1986); *NCAA*, 468 U.S. at 109 (1984); *Prof'l Eng'rs*, 435 U.S. at 692. In such cases, "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999). In other words, "quick-look analysis carries the day when the great likelihood of

anticompetitive effects can easily be ascertained." *Id.* Under "quick look" analysis, the competitive harm is presumed, and "the defendant must promulgate 'some competitive justification' for the restraint." *Brown*, 5 F.3d at 669 (quoting *NCAA*, 468 U.S. at 110). "If no legitimate justifications are set forth, the presumption of adverse competitive impact prevails and 'the court condemns the practice without ado.'" *Id.* (quoting *Chicago Prof'l Sports Ltd. P'ship v. NBA*, 961 F.2d 667, 674 (7th Cir. 1992)). "If the defendant offers sound pro-competitive justifications, however, the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis." *Id.*

"[T]here is often no bright line separating" the different modes of analysis. *NCAA*, 468 U.S. at 104 n.26. "'There is always something of a sliding scale in appraising reasonableness, but the sliding scale formula deceptively suggests greater precision than we can hope for. . . . Nevertheless, the quality of proof required should vary with the circumstances.'" *Cal. Dental*, 526 U.S. at 779 (quoting Philip E. Areeda, *Antitrust Law* ¶ 1507, at 402 (1986)). "[The] categories of analysis of anticompetitive effect are less fixed than terms like '*per se*,' 'quick look,' and 'rule of reason' tend to make them appear." *Id.* Regardless of the standard used, the purpose of the inquiry is always to assess the effect of the conduct on competition: "Whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances

competition." *NCAA*, 468 U.S. at 104. As the Supreme Court summarized:

> [T]here is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one.

Cal. Dental, 526 U.S. at 780-781. Thus, the three modes of analysis should be viewed as a single inquiry that, depending on the circumstances, may sometimes be conducted by applying various presumptions. *See generally* 7 Philip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1511, at 418 (2d ed. 2000).

C.

The Federations contend that the Brave New World plan "allocates and divides the player services market among horizontal competitors" and "[t]his obviates competition among favored tournaments for the player services vital for success, while making it impossible for other tournaments . . . to compete for such services."

Appellant's Br. 48. The Federations allege an output-limiting horizontal restraint. Nevertheless, the *per se* rule does not apply because for a tennis tour, like other sports leagues, "horizontal restraints on competition are essential if the product is to be available at all." *NCAA*, 468 U.S. at 101; *see also Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 23, 99 S. Ct. 1551, 60 L. Ed. 2d 1 (1979) (rejecting *per se* treatment "where the agreement on price is necessary to market the product at all"); *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 959 (6th Cir. 2004) ("Because there is no doubt that horizontal restraints are necessary to make the kind of league competition at issue available, the rule of reason applies."); *Law v. NCAA*, 134 F.3d 1010, 1019 (10th Cir. 1998) ("[C]ourts consistently have analyzed challenged conduct under the rule of reason when dealing with an industry in which some horizontal restraints are necessary for the availability of a product . . . .").

Under "quick look," the rationale for presuming competitive harm without detailed market analysis is that the anticompetitive effects on markets and consumers are obvious. *Cal. Dental*, 526 U.S. at 770. Although the Federations contended the Brave New World Plan restrained the "top player services" market, the definition of the relevant market was one of the most contested issues at trial—so much so that after all the evidence was presented the District Court saw the bounds of the relevant market as "ambiguous." App. 25. Because "the contours of the market" here are not "sufficiently well known or defined to permit the court

to ascertain without the aid of extensive market analysis whether the challenged practice impairs competition," "quick look" is not appropriate and proof of relevant market is required under full-scale rule of reason. *Worldwide Basketball & Sport Tours*, 388 F3d at 961.

Further, even where anticompetitive effects are obvious, "quick look" condemnation is proper only after assessing and rejecting the logic of proffered procompetitive justifications. *Cal. Dental*, 526 U.S. at 771; *see N. Tex. Speciality Physicians v. FTC*, 528 F3d 346, 362 (5th Cir. 2008). Although competitive harm is initially presumed under "quick look," "[i]f the defendant offers sound procompetitive justifications, . . . the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis." *Brown*, 5 F3d at 669; *see also Cal. Dental*, 526 U.S. 756, 771, 119 S. Ct. 1604, 143 L. Ed. 2d 935 (1999) (holding that full rule of reason analysis was required where challenged restraint "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition"); *Bogan v. Hodgkins*, 166 F3d 509, 514 n.6 (2d Cir. 1999) (observing that courts must apply the full rule of reason once defendant has introduced "sound allegations of procompetitive benefit"). Where procompetitive justifications are proffered, their logic must be assessed and rejected in order to avoid reverting to full-scale rule of reason analysis. "[T]he burden remains on the challenger to demonstrate that the proffered procompetitive effect does not plausibly result in 'a net procompetitive effect, or possibly no effect at all on competition.'" *N. Tex. Speciality*

Physicians, 528 F.3d at 362 (quoting *Cal. Dental*, 526 U.S. at 771). "If, after examining the competing claims of anti-and procompetitive effects, it remains plausible that the net effect is procompetitive or that there is no effect on competition, then "[t]he obvious anticompetitive effect that triggers abbreviated analysis has not been shown." *Id.* (quoting *Cal. Dental*, 526 U.S. at 778); *see also* 11 Areeda & Hovenkamp, *supra*, ¶ 1911c, at 305 (2d ed. 2005) (explaining that when defendant offers preliminary evidence suggesting that the challenged restraint is justified, and the court finds such evidence plausible, the restraint must be "subjected to general rule of reason analysis requiring full consideration of power and anticompetitive effects").

ATP proffered evidence of procompetitive justifications for the Brave New World plan. The plan was developed to make the ATP Tour more competitive with other spectator sports and entertainment products by improving the quality and consistency of its top-tier events. The modifications to the tour calendar, increase of investment, higher payments to players, and expanded geographic reach were all designed to improve the Tour. Such rules and regulations can be procompetitive where they enhance the "character and quality of the 'product.'" *NCAA*, 468 U.S. at 102.

In fact, the Federations seem to concede that ATP offered procompetitive justifications. But they would have the jury balance the proffered procompetitive justification against the presumed anticompetitive harm. They argue that under "quick look," the jury's inquiry

"starts from the premise—already determined by the court as a matter of law—that the restraint's anticompetitive effect is evident without need for detailed market analysis, requiring no proof by plaintiff of market definition or power." Appellant's Reply Br. 7. The Federations misapprehend the reasonableness analysis. Once a defendant comes forward with plausible procompetitive justification for the challenged restraint, the "quick look" presumption disappears and the overall reasonableness of the restraint is assessed using a full-scale rule of reason analysis. *Brown*, 5 F.3d at 669. "The application of the quick look analysis is a question of law to be determined by the court," and therefore the concept of "quick look" has no application to jury inquiry. ABA Section of Antitrust Law, Model Jury Instructions in Civil Antitrust Cases A-8 n.2 (2005). The jury was properly instructed to analyze the alleged restraints under the rule of reason, and their finding that the Federations failed to prove the relevant market defeats the Sherman Act § 1 claim.[8]

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8. The Federations also appeal the District Court's grant of judgment as a matter of law on all antitrust liability claims against individual ATP directors. Relying on *Murphy Tugboat Co. v. Shipowners & Merchs. Towboat Co.*, 467 F. Supp. 841 (N.D. Cal. 1979), *aff'd sub nom. Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256 (9th Cir. 1981), the District Court held "that civil liability for antitrust violations is limited to participation in inherently unlawful acts, that is, [] per se violation[s] of antitrust law." App. 24. It concluded that "the evidence [in this case] shows the individuals' conduct was not the type of inherently wrongful activity that gives rise to personal liability under antitrust law," but "seem[s] within or at least bordering that gray area of socially acceptable economically justifiable business conduct that the law, in fact, permits." *Id.* at 25.

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Appendix A

III.

A.

On the Sherman Act § 1 claim, the jury also found the Federations did not prove that ATP entered into "contract(s), combination(s) or conspiracy(ies) with any separate entity or entities." In other words, the jury did not find the requisite concerted action to support a § 1 claim. The Federations assert the jury reached this conclusion based on the "single entity or enterprise defense" instruction, which allowed the jury to find that defendants' actions were undertaken as a single entity, instead of as independent actors. The Federations

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The Federations argue that the District Court's limitation of directors' personal liability to *per se* antitrust violations is legally incorrect. We question the persuasive value of *Murphy Tugboat*. *See, e.g.*, *Monarch Marking Sys., Inc. v. Duncan Parking Meter Maint. Co.*, No. 82 C 2599, 1986 U.S. Dist. LEXIS 28261, 1986 WL 3625, at *2 (N.D. Ill. Mar. 13, 1986); Gregory Walker, Note, *The Personal Liability of Corporate Officers in Private Actions Under the Sherman Act: Murphy Boat in Distress*, 55 Fordham L. Rev. 909 (1987) (criticizing *Murphy Tugboat* approach to corporate officers' personal liability for antitrust violations). But we need not decide whether the District Court erred in imposing a limitation on directors' personal liability and dismissing the antitrust claims against them. Because the Federations could not sustain their antitrust claims and failed to prove an antitrust violation, they would not be able to sustain the same claim against the Directors. Therefore, even assuming the District Court erred in granting summary judgment on the antitrust claims against the directors, plaintiffs cannot prevail on these claims.

contend the instruction misstated the law and thus was given in error.[9]

To prevail under § 1 of the Sherman Act, a plaintiff must first establish a "contract, combination . . . or conspiracy." Section 1 applies only to concerted action and does not proscribe independent action by a single entity, regardless of its purpose and effect on competition. *Am. Needle, Inc. v. NFL*, No. 08-661, 130 S. Ct. 2201, 176 L. Ed. 2d 947, 2010 U.S. LEXIS 4166, 2010 WL 2025207, at *5 (U.S. May 24, 2010); *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761, 104 S. Ct. 1464, 79 L. Ed. 2d 775 (1984). [10]

Under *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 104 S. Ct. 2731, 81 L. Ed. 2d 628 (1984), in certain cases, distinct legal entities are incapable of concerted action for the purposes of § 1 and must be viewed as a single entity.[11] Although *Copperweld* did not set clear parameters for what

9. "We exercise plenary review to determine whether jury instructions misstated the applicable law . . . ." *Cooper Distrib. Co. v. Amana Refrigeration., Inc.*, 180 F.3d 542, 549 (3d Cir. 1999).

10. Independent action by a single entity can still be scrutinized under § 2 of the Sherman Act. *Fineman v. Armstrong World Indus., Inc.*, 980 F.2d 171, 205 (3d Cir. 1992).

11. In *Copperweld*, the Supreme Court held that "the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act." 467 U.S. at 771. The Court reasoned that § 1 scrutiny is not justified because "[a] parent and its wholly owned subsidiary have a complete unity of interest," and when

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constitutes a single economic entity beyond the parent-subsidiary context, "it nonetheless encouraged the courts to analyze the substance, not the form, of economic arrangements."[12] *Siegel Transfer, Inc. v. Carrier Express, Inc.*, 54 F.3d 1125, 1132 (3d Cir. 1995); *see Am. Needle*, 2010 U.S. LEXIS 4166, 2010 WL 2025207, at *8 ("As *Copperweld* exemplifies, 'substance, not form, should determine whether a[n] . . . entity is capable of conspiring under § 1.'" (quoting *Copperweld*, 467 U.S. at 773 n.21)). Courts have applied the single-entity concept to joint ventures of separately owned

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they agree to a course of action, "there is no sudden joining of economic resources that had previously served different interests." *Id.* The antitrust laws treat concerted behavior more strictly than unilateral behavior because "[c]oncerted activity inherently is fraught with anticompetitive risk." *Id.* at 768-69. Concerted action "deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands." *Id.* at 769. But although parent and wholly owned subsidiaries are distinct corporate entities and independent legal persons, they nevertheless compose a single economic entity for antitrust scrutiny because "[t]hey share a common purpose," *id.* at 771. Since they always have a "unity of purpose or a common design," *id.*, they are "incapable of conspiring with each other for purposes of § 1 of the Sherman Act," *id.* at 777.

12. Courts have extended *Copperweld* to situations involving sibling-subsidiaries of the same parent corporation, *see Eichorn v. AT&T Corp.*, 248 F.3d 131 (3d Cir. 2001), subsidiaries owned by the same co-owners who maintained control over them, *see Century Oil Tool, Inc. v. Prod. Specialties*, 737 F.2d 1316 (5th Cir. 1984), and franchisors and franchisees, *see Williams v. I.B. Fischer Nev.*, 999 F.2d 445 (9th Cir. 1993).

entities. In determining whether *Copperweld* applies to joint ventures, courts have focused primarily on whether the venture "bring[s] together the economic power of actors which were previously pursuing divergent interests and goals."[13] *Siegel Transfer*, 54 F.3d at 1137. "The key is whether the alleged 'contract, combination . . ., or conspiracy' is concerted action—that is, whether it joins together separate decisionmakers." *Am. Needle*, 2010 U.S. LEXIS 4166, 2010 WL 2025207, at *8. "The relevant inquiry, therefore, is whether there is a 'contract, combination . . . or conspiracy' amongst separate economic actors pursuing separate economic interests, such that the agreement deprives the marketplace of independent centers of decisionmaking, and therefore of diversity of entrepreneurial interests, and thus of actual or potential competition." *Id.* (internal quotation marks omitted). Indisputably, joint ventures can be economically beneficial. But "the fact that joint venturers pursue the common interests of the whole is generally not enough, by itself, to render them a single entity." *Freeman v. San Diego Ass'n of Realtors*, 322 F.3d 1133, 1148 (9th Cir. 2003). "[A] commonality of

13. *See, e.g., Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1035 (9th Cir. 2005) (holding that a national club and its regional affiliates were incapable of conspiring as separate entities because they were not competitors and maintained an economic unity); *City of Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268 (8th Cir. 1988) (holding that a rural electrical cooperative consisting of three tiers of cooperatives with interlocking ownership was a single entity because member cooperatives shared a common goal of providing low-cost electricity).

interest exists in every cartel." *Id.* (quoting *L.A. Mem'l Coliseum v. NFL*, 726 F.2d 1381, 1389 (9th Cir. 1984)). The formalities should not detract from the necessity to examine the economic realities of the restraints imposed on competition by a joint venture. *See Am. Needle*, 2010 U.S. LEXIS 4166, 2010 WL 2025207, at *6 ("[W]e have eschewed such formalistic distinctions in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate."). The focus of the inquiry under § 1 of the Sherman Act centers on diminution of competition that would otherwise exist. *Id.* at *8. When the agreement joins together independent centers of decisionmaking, "the entities are capable of conspiring under § 1, and the court must decide whether the restraint of trade is an unreasonable and therefore illegal one." *Id.* at *9.

B.

At trial, ATP contended it constitutes a single enterprise, and under *Copperweld*, its internal decisions cannot violate § 1 of the Sherman Act. It asserted each of its tournament members is dependent on the others to produce a common product—a marketable annual professional tennis tour that competes with other forms of entertainment, within and without the sports arena. ATP maintained its members do not compete but instead cooperate to produce the Tour, and its adoption of the Brave New World plan was the core activity of producing this product. For their part, the Federations contended ATP operates in the market for top tier men's professional tennis players, and individual tournaments

compete to attract top players. They asserted the Brave New World plan was an agreement unreasonably restraining trade in this alleged market. Both parties presented expert testimony. The District Court concluded "there [were] at least underlying facts that [were] critical to" a determination of "whether the ATP and its members function as a single business entity," and that these facts are "beyond [the] Court's purview and in need of attention by a jury." App. 36. Accordingly, the court gave the jury ATP's proposed single enterprise instruction.

C.

In the context of the professional sports industry, courts have historically subjected sports leagues to antitrust scrutiny under § 1 of the Sherman Act. In *NCAA v. Board of Regents*, 468 U.S. 85, 104 S. Ct. 2948, 82 L. Ed. 2d 70 (1984), decided eight days after *Copperweld*, the Supreme Court considered a § 1 challenge to the NCAA's restrictions on member institutions' ability to enter into separate contracts to televise their football games. The Court acknowledged that "a certain degree of cooperation is necessary" to preserve the "type of competition that [the NCAA] and its member institutions seek to market." *Id.* at 117. But the Court concluded that because the challenged plan "prevent[ed] member institutions from competing against each other," they had "created a horizontal restraint—an agreement among competitors on the way in which they will compete with one another." *Id.* at 99. After analyzing the reasonableness of the alleged

restraint, the Court held it violated § 1 of the Sherman Act. *Id.* at 120.

Many other courts have resisted single entity arguments involving sports industries.[14] But the Court of Appeals for the Seventh Circuit in *Chicago*

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14. *See e.g., NHL Players Ass'n v. Plymouth Whalers Hockey Club*, 419 F.3d 462, 470 (6th Cir. 2005) (holding that the hockey league's adoption of a players-eligibility rule was "an agreement between multiple actors"); *Sullivan v. NFL*, 34 F.3d 1091, 1099 (1st Cir.1994) (refusing to hold as a matter of law that the NFL is a single entity under *Copperweld*); *L.A. Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1388-89 (9th Cir. 1984) (rejecting the NFL's argument for single entity treatment because "[w]hile the NFL clubs have certain common purposes . . . NFL policies are not set by one individual or parent corporation, but by the separate teams acting jointly"); *Mid-South Grizzlies v. NFL*, 720 F.2d 772, 778, 787 (3d Cir. 1983) (describing ways in which NFL teams compete with each other); *N. Am. Soccer League v. NFL*, 670 F.2d 1249, 1257-58 (2d Cir. 1982) (refusing to treat the NFL as a single economic entity and exempt it from liability under § 1 of the Sherman Act); *accord Volvo N. Am. Corp. v. Men's Int'l Prof'l Tennis Council*, 857 F.2d 55, 71 (2d Cir. 1995) (holding that an association consisting of representatives of national tennis associations, tournament owners and directors, and professional tennis players was a joint venture, consisting of multiple entities, and able to conspire under § 1 of the Sherman Act). *But see Seabury Mgmt., Inc. v. PGA of Am., Inc.*, 878 F. Supp. 771, 778 (D. Md. 1994) (holding that the PGA could not conspire with its regional sections as a matter of law), *aff'd in relevant part*, 52 F.3d 322 (4th Cir. 1995) (Table); *NFL v. N. Am. Soccer League*, 459 U.S. 1074, 1077, 103 S. Ct. 499, 74 L. Ed. 2d 639 (1982) (Rehnquist J., dissenting from denial of certiorari) (arguing that the NFL is a single entity because it "competes as a unit against other forms of entertainment").

Professional Sports Limited Partnership v. NBA, 95 F.3d 593 (7th Cir. 1996) ("*Bulls II*"), suggested that a sports league can sometimes be viewed as a single entity for antitrust purposes. *Id.* at 598 ("We see no reason why a sports league cannot be treated as a single firm . . . ."). The court concluded that *Copperweld*'s rule is not limited to the circumstances where cooperating parties have a "complete unity of interest." *Id.* Recognizing that whether the NBA "is more like a single firm . . . or like a joint venture . . . is a tough question" because "it has characteristics of both," the court concluded that "the league looks more or less like a firm depending on which facet of the business one examines." *Id.* at 599. "From the perspective of fans and advertisers . . . 'NBA Basketball' is one product from a single source," "[b]ut from the perspective of college basketball players who seek to sell their skills, the teams are distinct," and "the league looks more like a group of firms acting as a monopsony." *Id.* Remanding to the district court for determination of the issue, the court observed: "Sports are sufficiently diverse that it is essential to investigate their organization and ask *Copperweld*'s functional question one league at a time—and perhaps one facet of a league at a time . . . ." *Id.* at 600.

The parties in *Bulls II* settled after the case was remanded, but the Court of Appeals for the Seventh Circuit revisited the issue in *American Needle, Inc. v. NFL*, 538 F.3d 736 (7th Cir. 2008), *rev'd*, 130 S. Ct. 2201, 176 L. Ed. 2d 947, 2010 U.S. LEXIS 4166, 2010 WL 2025207 (U.S. May 24, 2010). Guided by principles

enunciated in *Bulls II*, the court affirmed the district court's grant of summary judgment for the NFL on a claim stemming from its practice of centralized licensing of intellectual property. *Id.* at 744 (concluding "the NFL teams are best described as a single source of economic power when promoting NFL football though licensing the teams' intellectual property"). But the Supreme Court reversed, finding the court's reasoning unpersuasive. 2010 U.S. LEXIS 4166, 2010 WL 2025207, at *10. The Court observed that each of the teams in the NFL is a "substantial, independently owned, and independently managed business." *Id.* at *9. The Court further noted the NFL teams "compete with one another, not only on the playing field, but to attract fans, for gate receipts and for contracts with managerial and playing personnel." *Id.* Specifically relevant to the case, the Court found "the teams compete in the market for intellectual property." *Id.* at *9. Therefore, the Court concluded "[d]ecisions by NFL teams to license their separately owned trademarks collectively and to only one vendor are decisions 'that depriv[e] the marketplace of independent centers of decisionmaking,' and therefore of actual or potential competition." *Id.* (quoting *Copperweld*, 467 U.S. at 770).

Similarly, the agreement among the ATP's tournament members in the Brave New World Plan might have deprived the marketplace of potential competition. Professional sports teams or tournaments always have an interest in obtaining the best players possible. *Brown v. Pro Football, Inc.*, 518 U.S. 231, 116 S. Ct. 2116, 135 L. Ed. 2d 521 (1996). The record in this

case indicates that the individual tennis tournaments traditionally compete for player talent. An agreement restricting this competition should not necessarily be immune from § 1 scrutiny merely because the tournaments cooperate in various aspects of producing the ATP Tour. "The justification for cooperation is not relevant to whether that cooperation is concerted or independent action." *Am. Needle*, 2010 U.S. LEXIS 4166, 2010 WL 2025207, at *11. The necessity of cooperation does not "transform[] concerted action into independent action." *Id.* "The mere fact that the teams operate jointly in some sense does not mean that they are immune." *Id.*

But we need not decide whether the single enterprise instruction was given in error. As noted, even if the jury had found concerted action, the Federations' antitrust claims still fail because they did not satisfy their burden of proving a relevant market. [15]

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15. In *American Needle*, the Supreme Court emphasized that "teams that need to cooperate are not trapped by antitrust law," *id.* at *12, because "'[t]he special characteristics of this industry may provide a justification' for many kinds of agreements." *Id.* (quoting *Brown*, 518 U.S. at 252). "When 'restraints on competition are essential if the product is to be available at all,' *per se* rules of illegality are inapplicable, and instead the restraint must be judged according to the flexible Rule of Reason." *Id.* (quoting *NCAA*, 468 U.S. at 101). As we explained *supra* Part II.C, given the circumstances of this case, the District Court correctly instructed the jury to evaluate the alleged restraints under the full rule of reason.

Appendix A

IV.

A.

In their complaint, the Federations asserted claims of breach of fiduciary duties of loyalty, due care, and good faith against six individual directors of ATP, all of whom voted in favor of the Brave New World plan. The District Court granted ATP's motion for judgment as a matter of law on these claims. The Federations appeal the judgment only in relation to their claim of breach of duty of loyalty by Director Charles Pasarell. Notably, they do not appeal the judgment in relation to their breach of fiduciary duty claims against the other five directors.

As noted, ATP is governed by a seven-member Board of Directors—three elected by tournament members, each representing a geographic region ("Tournament Representatives"), three elected by player members ("Player Representatives"), and a Chairman/President. Section 12.9 of ATP's Bylaws requires certain corporate actions to be approved by two affirmative votes of both the three Tournament Representatives and the three Player Representatives. The Brave New World plan required such an approval. The European Tournament Representative, Zejlko Franulovic, voted against most provisions of the Brave New World plan, citing concerns about restrictions on competition. Accordingly, the votes of the other two Tournament Representatives were necessary for adoption of the Brave New World plan.

Appendix A

Director Pasarell served as a Tournament Representative from 1990. At the same time, he also was employed as Tournament Director of the Indian Wells Masters Series Event and held a 24% ownership in the Indian Wells tournament. Indian Wells is a tournament member of ATP. The Federations claimed that his vote in favor of the Brave New World plan constituted a breach of duty of loyalty because it was self-interested.

The District Court rejected the Federations' argument, concluding that they failed to rebut the business judgment rule presumption with sufficient evidence that Pasarell was materially self-interested in the Brave New World transaction. The District Court observed that although Pasarell, like other tournament owners, stood to benefit from any projected success of the Brave New World plan, Indian Wells was already among the most financially successful tournaments, and did not need the Brave New World plan to make money. Further, the court also held that the other directors were not materially self-interested and the Federations do not appeal that finding.

B.

Under Delaware law, the business judgment rule "is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on*

other grounds by Brehm v. Eisner, 746 A.2d 244 (Del. 2000). Thus, "[t]he burden is on the party challenging the decision to establish facts rebutting the presumption." *Id.* The business judgment rule presumption can be rebutted by establishing "that the *board* was either interested in the outcome of the transaction or lacked the independence to consider objectively whether the transaction was in the best interest of its company and all of its shareholders." *Orman v. Cullman*, 794 A.2d 5, 22 (Del. Ch. 2002).[16] "To establish that a *board* was interested[,] . . . a plaintiff must allege facts as to the interest . . . of the *individual members* of that board." *Id.* Thus, a plaintiff must normally demonstrate "that a *majority* of the director defendants have a financial interest in the transaction . . . ." *Id.* (internal quotation marks and citation omitted);

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16. The presumption can also be rebutted by showing that "one or more directors less than a majority of those voting" suffers from a material and disabling interest and that "the interested director *controls or dominates* the board as a whole or [that] the interested director *fail[ed] to disclose his interest* in the transaction to the board and a reasonable board member would have regarded the existence of the material interest as a significant fact in the evaluation of the proposed transaction." *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1168 (Del. 1995) ("*Technicolor III*") (alteration in original) (quoting *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1134, 1153 (Del. Ch. 1994)); *see also In re Transkaryotic Therapies, Inc.*, 954 A.2d 346, 363 (Del. Ch. 2008). Because the Federations do not allege Pasarell controlled the ATP Board or failed to disclose his interest in Indian Wells, the only issue relevant to this appeal is whether the Board as a whole was interested and/or lacked independence. *See Orman*, 794 A.2d at 23.

see also Malpiede v. Townson, 780 A.2d 1075, 1084-85 (Del. 2001) (concluding that the claim of breach of fiduciary duty of loyalty was insufficient because it alleged self-interest of only one director); *Brehm v. Eisner*, 746 A.2d 244, 257 (Del. 2000) (determining whether a majority of the board was disinterested and independent); *Cinerama, Inc. v. Technicolor, Inc.*, 663 A.2d 1156, 1168 (Del. 1995) ("*Technicolor III*") (affirming Court of Chancery determination that "if actual self-interest is present and affects a *majority of directors* approving a transaction, the entire fairness standard applies" (emphasis added)).

C.

The Federations cannot prevail on their claim of breach of duty of loyalty because they failed to rebut the business judgment rule presumption. The District Court found that Pasarell was not materially self-interested in his Brave New World vote. The Delaware Supreme Court has defined "interest" to "mean[] that directors can neither appear on both sides of a transaction nor expect to derive any personal financial benefit from it in the sense of self-dealing, as opposed to a benefit which devolves upon the corporation or all stockholders generally." *Aronson*, 473 A.2d at 812. "[I]n the absence of self-dealing, it is not enough to establish the interest of a director by alleging that he received *any* benefit not equally shared by the stockholders. Such benefit must be alleged to be *material* to that director."[17]

17. The materiality requirement is not applicable to cases involving "classic self-dealing" where a director "stand[s] on

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Orman, 794 A.2d at 23 (citing *Cede & Co. v. Technicolor, Inc.*, 634 A.2d 345, 363 (Del. 1993), *modified*, 636 A.2d 956 ("*Technicolor II*")). "Materiality means that the alleged benefit was significant enough '*in the context of the director's economic circumstances*, as to have made it improbable that the director could perform her fiduciary duties to the . . . shareholders without being influenced by her overriding personal interest.'" *Id.* (omission in original) (quoting *In re Gen. Motors Class H S'holders Litig.*, 734 A.2d 611, 617 (Del. Ch. 1999)). "In determining the sufficiency of factual allegations made by a plaintiff as to . . . a director's interest . . . the Delaware Supreme Court . . . requires the application of a subjective 'actual person' standard to determine whether a *particular* director's interest is material and debilitating . . . ." *Id.* at 24 (quoting *Technicolor III*, 663 A.2d at 1167).

Pasarell was not materially self-interested because he did not stand to obtain any unique benefits from the Brave New World plan. "A director is considered interested where he or she will receive a personal

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both sides of a transaction." *HMG/Courtland Props., Inc. v. Gray*, 749 A.2d 94, 113-115 (Del. Ch. 1999). Although the Federations label Pasarell's vote as "self-dealing" instead of "self-interested," such characterization is misleading because Pasarell's Brave New World vote did not involve Indian Wells transacting with ATP. Pasarell's financial stake in Indian Wells was not "antithetic to the corporate interest in a . . . proposed course of action." 1 David A. Drexler et al., *Delaware Corporation Law and Practice* § 15.05[1]. The Federations allege that Pasarell received a special benefit. Thus, they must show materiality of the interest to rebut the business judgment rule presumption. *See generally id.*

financial benefit from a transaction that is not equally shared by the stockholders." *Rales v. Blasband*, 634 A.2d 927, 936 (Del. 1993); *see also Aronson*, 473 A.2d at 812. The Brave New World plan was designed to benefit all the ATP top tier tournaments—Pasarell's supposed benefits from the Brave New World plan were not unique. Moreover, Pasarell's alleged interest could not be subjectively material because the evidence showed that Indian Wells was already doing well financially, attracting top tennis players before the Brave New World plan was adopted. Therefore, the alleged benefit was not "significant enough in the context of the director's economic circumstances" to interfere with Pasarell's ability to perform his fiduciary duties "without being influenced by [his] overriding personal interest." *In re Gen. Motors Class H S'holders Litig.*, 734 A.2d at 617. Because the Federations failed to show Pasarell was self-interested, his vote is entitled to the protection of the business judgment rule. [18]

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18. Further, regardless of whether Pasarell's vote was materially self-interested, to rebut the business judgment rule presumption, the Federations would need to show that the ATP Board was materially self-interested. But because the Federations do not now dispute that the remaining five directors, who voted for the Brave New World plan, were not materially self-interested, the disinterested directors made up the majority of the Board (six out of seven) and the majority of directors voting to approve the Brave New World plan (five out of six). Therefore, the Federations cannot establish that the majority of the ATP directors were materially self-interested. The Federations emphasize that the Brave New World plan could not have been adopted without Pasarell's vote. They argue that the disinterested majority rule should not apply here

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because the ATP Bylaws' "super-majority" voting provisions made simple majority approval insufficient to adopt the Brave New World plan.

Because we hold the District Court was correct in its finding that Pasarell was not self-interested, we do not need to decide how the super-majority voting provisions might affect the self-interest inquiry. However, we note that the Delaware Supreme Court has previously addressed a similar issue. In *Technicolor III*, the corporation's certificate of incorporation included a provision which could be repealed with a recommendation made through a unanimous vote of qualified directors. 663 A.2d at 1170-71. The directors voted unanimously to recommend repealing the provision, but one of the directors was found to have been interested, and plaintiffs argued that the transaction was therefore voidable. The Delaware Supreme Court affirmed the Court of Chancery's conclusion that the unanimity provision in the charter "should not be construed to include an implied exclusion of interested directors from eligibility to participate in the unanimous vote." *Id.* at 1171. Similarly, Pasarell's necessary vote, even if materially interested, is not excluded by the super-majority provision of the ATP Bylaws. The provision states that "two affirmative votes of the Tournament Tour Board Representatives plus two affirmative votes of the Player Tour Board Representatives" are required. App. 2692. Like the provisions in *Technicolor III*, the bylaws here do not require exclusion of the interested votes, and *Technicolor III* suggests that no such exclusion can be implied. But although in *Technicolor III* the board's actions were examined under the business judgment rule and found not to have breached the duty of loyalty, neither the Court of Chancery nor the Delaware Supreme Court explicitly stated that the super-majority voting requirement does not affect the applicability of the business judgment rule presumption. As noted, because Pasarell was not self-interested, we do not need to decide this issue.

V.

For these reasons, we will affirm the jury verdict for defendants on the Sherman Act § 1 claim, and the District Court's judgment as a matter of law for defendant Pasarell on the breach of fiduciary duty of loyalty claim.

APPENDIX B — DISTRICT COURT JUDGMENT, VERDICT FORM OMITTED

Case 1:07-cv-00178-GMS Document 199
Filed 10/03/08

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

DEUTSCHER TENNIS BUND et al.,

Plaintiffs)
)
v.) Civil Action No. 07-178 GMS
)
ATP TOUR, INC. et al.,)
)
Defendants.)

JUDGMENT

This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict on August 5, 2008. The verdict was accompanied by a verdict form (D.I. 195), a copy of which is attached hereto. Therefore,

IT IS HEREBY ORDERED AND ADJUDGED that judgment be and is hereby entered in favor of the defendant, ATP TOUR, INC., and against the plaintiffs, DEUTSCHER TENNIS BUND, ROTHENBAUM SPORTS GMBH AND QATAR TENNIS FEDERATION.

Dated: October 3, 2008 /s/ Gregory M. Sleet
CHIEF, UNITED STATES
DISTRICT JUDGE

APPENDIX C — EXCERPTS OF ORAL DECISION OF UNITED STATES DISTRICT COURT FOR THE DISTRICT OF DELAWARE DATED OCTOBER 8, 2009

* * *

THE COURT: Counsel and the parties, as just indicated at sidebar, the Court is prepared to rule on various of the motions for judgment as a matter of law that have been filed by the defendants.

Now before the Court are the various defendants' motions for judgment as a matter of law pursuant to Federal Rule of Civil Procedure 50(a) on the plaintiffs' claims in this case, the various claims of personal liability for damages, the conversion claim, the tortious interference claim, the antitrust claims as to relevant product and geographic markets.

These motions are docketed as Items 183, 184, 185 and 186.

Pursuant to Rule 50(a)(1), if the Court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the plaintiffs on an issue, then the Court may resolve the issue and grant judgment as a matter of law on claims that require a favorable finding on that issue. After receiving briefing and hearing argument on all of these motions, the Court now rules with this standard in mind.

The Court first considers the antitrust claims with respect to the individual defendants. In the absence of binding Supreme Court or Third Circuit precedent on

the issue of personality liability of individual defendants under antitrust law, this Court looks to other courts for guidance.

This Court will apply the standard articulated by the District Court in Murphy Tugboat. Thus, this Court finds that personal civil liability for antitrust violations is limited to participation in inherently unlawful acts, that is, a per se violation of antitrust law.

The plaintiffs describe the alleged violations in this case as classic per se violations. In this Court's judgment, that label does not fit so neatly as they would like. The complexity of these particular arrangements, the peculiar industry of sports, and the ambiguity of the bounds of the relevant market, all counsel against treating the business practices in dispute here as per se violations of antitrust law.

Accordingly, the Court declines to view them as such. The evidence adduced by the plaintiffs in this case could perhaps be evidence of certain illegalities, that is, antitrust violations, but only after one engaged in a detailed examination of the industry in question, and, furthermore, only after taking the industry in question to be top-tier men's professional tennis, rather than, for example, professional sports or spectator events more generally.

Thus, the evidence here shows the individuals' conduct was not the type of inherently wrongful activity that gives rise to personal liability under antitrust law.

Instead, these individual board members' actions, including authorizing certain corporate acts, seem within or at least bordering that gray area of socially acceptable economically justifiable business conduct that the law, in fact, permits.

In summary, the plaintiffs have failed to show evidence that the individual defendants have engaged in acts or business practices that have no purpose except to stifle competition, that is, that they engaged in agreements or arrangements whose nature and necessary effect are so plainly anticompetitive as to constitute per se antitrust violations. Because of this, the Court finds that the individual defendants' personal liability does not attach to the individual defendants here.

Thus, the Court will grant judgment as a matter of law on the antitrust claims in Counts 1 through 4 to the individual defendants.

* * *

To recapitulate, the Court is granting the motions docketed at Docket Items 183, 184, 185. That is, the defendants' motions for judgment as a matter of law on all claims of the directors' personal liability for damages the tortious interference and on the conversion claim. The Court is reserving ruling, however, on the motion for JMOL as to the relevant product and geographic markets docketed at 186. That is the Court's ruling.

Appendix C

All right then. We need to convene a discussion on the jury instructions on the remaining claim.

* * *

To recapitulate, the court is granting the motions docketed at Docket Items 183, 184, 185. That is, the defendants' motions for judgment as a matter of law on all claims of the directors' personal liability for damages the tortious interference and on the conversion claim. The Court is reserving ruling, however, on the motion for JMOL as to the relevant product and geographic markets docketed at 186. That is the Court's ruling.

All right then. We need to convene a discussion on the jury instructions on the remaining claim.

* * *

THE COURT: Let's continue on. Mr. Underwood.

MR. UNDERWOOD: The next would be the parties' Proposed Jury Instruction 5, which is on Page 17 of 20, relating to the single entity or enterprise defense asserted by defendants.

We have prepared a description of what we believe the relevant issues to consider regarding a single entity are. This is not something that is covered by the Model Jury Instructions.

Appendix C

We have cited the authority on which we rely for the various propositions that we have set forth in the jury instruction.

THE COURT: Is that the third paragraph? The whole instruction is not agreed? Or is it just certain paragraphs? I see the plaintiffs object, saying that the instruction misstates the law, among other things.

MR. UNDERWOOD: The plaintiffs' basis for asserting it misstates the law is their view that the vast majority of courts that have considered this issue have ruled differently, as you see in the second paragraph of their objection, by that time they say uniformly. In fact, this is not uniformly. The cases we cite in our footnotes go the other way. But they say courts have relied on a number of facts consistently to determine this issue.

We think it is appropriate to consider the facts that the courts have relied on, that is the jury, is, indeed, as the finder of fact, the one to determine whether the ATP for the purposes of producing its product acts as a single entity or not.

They also take issue with our citation of the Daubert case, having read their objection, and read the Daubert case, and the Supreme Court case on joint ventures, in which the Supreme Court said, as plaintiffs suggest here, the Supreme Court said we don't have to reach whether the rule of reason applies here because we find no agreement, which is, in essence, we find that it is a single entity for the purposes that the joint venture in that case was constituted.

We believe that it is applicable to the question of single entity that the members of the ATP come together for the purpose of producing, as you will recall Dr. Walker explaining, producing a product that can't be produced absent that coordination.

That is why we would submit our proposal on the single entity issue.

THE COURT: Mr. MacGill?

MR. MacGILL: Your Honor, to be specific in terms of the legal standard for single entity status, I think the nature of the entity and its ability to combine and conspire under Section 1 is something for the Court to analyze as a matter of law. Specifically, the vast majority of courts, as we have cited, have said that Section 1 claims in the sports context, they do not treat sports leagues as single entities, and we have cited a repeated number of cases.

Before we even get started on that particular argument, the fact is, this is not a league. This is the ATP tennis. It is a series of tournaments. This doesn't build to a competition between teams. It is not involving a competition between teams. With respect to our courts as they have looked at this, even in the league context, and the cases we have cited, Frazier v. Major League Soccer, the NFL case, the Eighth Circuit decision 154 F3d 851, they have all come to this particular conclusion.

Appendix C

The record evidence here, Your Honor, is we have 63 different corporations that have independent balance sheets, independent financial statements.

THE COURT: You would disagree that there are facts in dispute that are in need of the jury's attention, as is indicated by Paragraph 3? An issue you will be called upon to decide is whether the ATP and its members function as a single business entity. It seems to me there are at least underlying facts that are critical to that determination that are beyond this Court's purview and in need of attention by a jury.

I am going to disagree with you on this one. Incorporate this into the instruction. What is the next one?

MR. UNDERWOOD: Your Honor, the next three would be plaintiffs' proposed 7, 8 and 9, which relate to a quick-look analysis. The quick-look analysis applies –

THE COURT: What page number?

MR. UNDERWOOD: 22, 23 and 24.

THE COURT: Go ahead.

MR. UNDERWOOD: The quick-look analysis required a finding by the Court that the case was not appropriate for a full rule-of-reason inquiry, that there are blatantly anticompetitive aspects to the conduct. It's essentially half of a per se ruling. There is clearly

anticompetitive conduct here, the only thing for the jury to consider is whether there is a corresponding competitive benefit. That is essentially what a quick-look analysis is. I don't think the plaintiffs have laid a foundation and have made an application to the Court to treat this as a quick look.

THE COURT: I agree. I think inherent in my ruling, the conclusion, it would be inappropriate to do so.

I am not going to hear from you, Mr. MacGill.

MR. MacGILL: Fair enough.

* * * *

APPENDIX D — SHERMAN ACT SECTION 1, 15 U.S.C. SECTION 1

15 U.S.C.A. § 1
United States Code Annotated Currentness
Title 15. Commerce and Trade
Chapter 1. Monopolies and Combinations in Restraint of Trade (Refs & Annos)
§ 1. Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

No. 10-421

In the

Supreme Court of the United States

DEUTSCHER TENNIS BUND, ROTHENBAUM SPORTS GMBH AND QATAR TENNIS FEDERATION,

Petitioners,

v.

ATP TOUR, INC., ETIENNE DE VILLIERS, CHARLES PASARELL, GRAHAM PEARCE, JACCO ELTINGH, PERRY ROGERS, AND IGGY JOVANOVIC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION.

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QUESTION PRESENTED

Did the Court of Appeals correctly affirm the jury's rejection of Petitioners' Sherman Act Section 1 claim where the District Court found that there were factual and economic disputes precluding a "Quick Look" analysis of the changes to the format, rules and structure of Respondent's tennis circuit and where the jury found that Petitioners failed to prove their asserted relevant market for "top-tier" player services in any event?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The caption contains the names of all parties to the proceeding below. Respondent ATP Tour, Inc. is a non-profit, Delaware non-stock membership corporation. No publicly held company owns 10% or more of ATP Tour, Inc.

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION.

INTRODUCTION

The decision of the Third Circuit unanimously affirming a jury verdict in favor of Respondent ATP Tour, Inc. ("ATP") is premised on a basic principle of antitrust law: where a plaintiff fails to establish any relevant market – and indeed where a jury specifically so finds – the plaintiff loses. That is what happened here.

The efforts by Petitioners Deutscher Tennis Bund ("DTB") and Qatar Tennis Federation ("QTF") (together, the "Federations") to recast this case are

without basis factually or legally. In all events, the Federations do not raise any determinative or fundamental legal issues under the antitrust laws that could save their failed lawsuit, much less identify any issue on which there is a conflict among the circuits.

After a two-week trial, and a full presentation from all of the Federations' fact and expert witnesses, the Federations failed to prove any of their antitrust claims against the ATP. The jury found in its special verdict that the Federations failed to prove an essential element of their case – namely the supposed existence of a self-proclaimed market for "top player services" (which the Federations posited at trial solely for purposes of this case).

The Third Circuit correctly affirmed the jury's verdict under well-settled antitrust law. No further review of the jury's verdict, or of the Third Circuit's affirmance, is warranted.

The Federations did not, and do not, challenge the sufficiency of the evidence supporting the jury's verdict. Instead, the Federations seek to avoid the jury's finding by insisting that that the jury should have been instructed to conduct a Quick Look review and that a Quick Look review would have permitted the jury to find a Section 1 violation despite the Federations' failure to prove the existence of a relevant market – let alone any anticompetitive market impact. The Federations are wrong.

First, every Section 1 claim is premised on the threat of "anticompetitive effect on customers and markets." *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999). Quick Look is not a separate species of Section 1 violation that dispenses with the

fundamental requirement of market impact. Quick Look is merely a mode of analysis that applies when the market impact is so "obvious" that an extensive market analysis is unnecessary. *Id.* The Federations' own supposed Quick Look jury instructions expressly assumed a finding of "substantial harm to competition in a relevant market" from the challenged conduct. Opp. App. 16a-17a. Market impact is not "obvious" – and therefore Quick Look does not apply – where, as here, the very existence and contours of the claimed market were hotly contested and factually disputed – so much so, in fact, that the jury found the Federations' proof lacking after considering all of the evidence presented. *See, e.g.*, *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955, 961 (6th Cir. 2004).

The Third Circuit applied these basic principles of antitrust law to the facts at hand. The Federations do not dispute that their self-proclaimed "top player services" market was vigorously contested and that its boundaries were found to be "ambiguous." Pet. App. 20a. (Indeed, the Federations affirmatively argued that the case presented "immensely complicated" issues requiring an "extremely careful and nuanced analysis" of evidence to assess market definition and competitive effects. Opp. App. 28a.)

Standing alone, such disputes over the market preclude any finding of the "obvious" anticompetitive impact on "markets and consumers" that is necessary for a truncated, Quick Look review. In addition, the Third Circuit correctly concluded that restraints within sports leagues are not naked restraints on price or output (or other inherently suspect conduct) in any event because such

restraints "are essential if the product is to be available at all." Pet. App. 20a (quoting *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984)). Even now, the Federations do not claim that the challenged conduct resulted in any reduction in output or increase in price in any market, however described. Thus, fundamentally, this was never a Quick Look case.

Given the market complexities, and the lack of any naked restraint or inherently suspect conduct, the Third Circuit correctly concluded that Quick Look was inapplicable to the Federations' claims. Pet. App. 20a-21a. The speculation by the Third Circuit, in *dicta*, that some of the challenged tour rules "might" have an (unproven) impact on an undefined "player services" market is insufficient on its face to invoke Quick Look. The possibility of impact on a market indicates nothing more than that, as in any Rule of Reason case that goes to a jury, the potential competitive impacts were to be proven and weighed. The Third Circuit's speculation is irrelevant in any event because the Federations strategically chose to rest their claims on a supposed "top-tier" player services market that they never proved.

Second, the Federations' request for review makes no sense given the jury's rejection of their theory on the facts. Where applicable, Quick Look is a procedural device to shortcut a "detailed" market analysis because of the self-evident impact on markets and consumers. *Cal. Dental*, 526 U.S. at 770. Here, the Federations failed to prove their relevant market after a full, two-week trial. While Quick Look may be useful to resolve some claims expeditiously without submission to a full trial, it

cannot be used, after the fact, to excuse a failure of proof after a full and fair opportunity to prove Section 1 claims at trial. The supposed anticompetitive effects on consumers and markets cannot be more obvious with less proof and analyis.

Third, because this case fundamentally is not a Quick Look case, none of the supposed Circuit splits on Quick Look that the Federations claim are relevant. In any event, the alleged Circuit splits do not exist. The Third Circuit's analysis is entirely consistent with the settled precedent in actual Quick Look cases.

Fourth, even if the disputed and ultimately unproven nature of the "top player services" market could be ignored, the Federations never moved the District Court under Fed. R. Civ. P. 56 before trial or Fed. R. Civ. P. 50 during or after trial to apply a Quick Look analysis. The Federations only proposed Quick Look jury instructions. Where applicable, Quick Look is a procedural device used by the court. The Federations do not cite a single case holding that Quick Look is a jury question. Review of the Third Circuit's Quick Look discussions would be imprudent because the Federations' procedural default would preclude recovery under Quick Look even were that the correct mode of analysis.

Finally, even if this were a Quick Look case, the Federations' claims fail independently for, among other deficiencies, lack of antitrust standing and failure to prove antitrust injury. Both are requisite elements to recovery under the Sherman and Clayton Acts by private litigants such as the Federations. Although the Third Circuit had no need to address these additional, fatal flaws in the

Federations' Section 1 claims, both issues were fully preserved for appeal.

STATEMENT OF THE CASE

ATP is a non-profit membership corporation comprised of men's professional tennis tournaments and players. ATP operates an annual men's professional tennis circuit in dozens of cities around the world (the "Tour").

The Federations are ATP members that together own an ATP tournament in Hamburg, Germany. The QTF also owns an ATP tournament in Doha, Qatar.

In 2007, ATP's Board of Directors voted to modify the format of the Tour under ATP's "Brave New World" plan ("BNW"). BNW was implemented in response to consumer demand to make the Tour more interesting, more exciting, easier to follow, and more competitive with other sports and entertainment offerings. Among other things, BNW increased compensation (prize money) to players, improved travel schedules between tournaments, and improved the quality of the facilities by increasing investment in new and existing stadia. BNW also sought to offer consumers more and better quality events and a more coherent ranking system.

As part of BNW, the Federations submitted an application to ATP seeking to have the Hamburg tournament selected as one of the nine Tour events offering winners 1,000 ranking points. The Board denied the Federations' application for a "1,000" designation, and instead designated the Hamburg tournament as a "500" point tournament (keeping the tournament within the top third of the Tour's events).

A. The Federations Sought to Prove a Restraint on an Alleged "Top Player" Services Market.

The Federations sued ATP and the individual Board members who voted to reject the Federations' application. The Federations alleged claims under Sections 1 and 2 of the Sherman Act, as well as various state law claims.

The Federations' antitrust claims alleged, in relevant part, that ATP had restrained the input "market for player services for top-tier men's professional tennis."[1] Opp. App. 20a-27a. The existence and contours of this professed market were among the most hotly contested factual issues at trial. Pet. App. 20a.

B. The Jury Rejected the Federations' Antitrust Claims After a Two Week Trial, Finding Insufficient Proof of the Alleged "Top Players" Market.

The Federations' claims were tried to a jury over the course of more than two weeks. The Federations presented their theory of the case through the direct and cross examination of more than fifteen fact witnesses and four economics and damages experts and the presentation of nearly 1,000 exhibits.

ATP's Board members moved for judgment as a matter of law on the Section 1 claims brought against them individually. The Board members argued that they could not be liable absent a *per se*

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[1] The Federations also sought to prove an output market for "top-tier men's professional tennis" and an input market for "sanctions for top-tier men's professional tennis events. Opp. App. 20a.

Section 1 violation and that the Federations had failed to prove any *per se* violation. The District Court agreed, finding that:

> "The complexity of these particular arrangements, the peculiar industry of sports, and the ambiguity of the bounds of the relevant market, all counsel against treating the business practices in dispute here as per se violations of antitrust law."

The District Court further held that:

> "The evidence adduced by the plaintiffs in this case could perhaps be evidence of certain illegalities, that is, antitrust violations, but only after one engaged in a detailed examination of the industry in question, and, furthermore, only after taking the industry in question to be top-tier men's professional tennis, rather than, for example, professional sports or spectator sports more generally."

Pet. App. 44a.

The Federations never moved for judgment as a matter of law under Fed. R. Civ. P. 50 to have the District Court condemn ATP's challenged conduct under a Quick Look analysis (although any such motion would have failed given the evidence and the subject matter of the Federations' challenge). The Federations instead merely proposed supposed Quick Look jury instructions (without citing a single case holding that Quick Look can be applied by a jury). Yet, tellingly, the Federations' own proposed instructions expressly presumed findings of "significant competitive harm" in "relevant markets" from the challenged conduct even though the District Court had never been asked to make such findings. Opp. App. 16a.

ATP objected to the proposed instructions, including on the ground that Quick Look is not a jury issue and that the prerequisites for Quick Look were absent. Opp. App. 16a-19a.

The District Court held that it would be "inappropriate" to give the proposed Quick Look instructions in light of its findings that the complexities of the industry and the ambiguous nature of the relevant market precluded any conclusion that the challenged conduct was obviously anticompetitive. Pet. App. 50a. Instead, a "detailed" examination of the industry was needed, including consideration of whether any analysis could be limited to "top tier" tennis, as the Federations had urged. *Id.*

The District Court instructed the jury to analyze the Federations' Section 1 claims under a Rule of Reason analysis. This included instructions with respect to proof of the posited "top-tier" player services market. Opp. App. 20a-27a. (The same relevant market instruction was given with respect to both the Section 1 and Section 2 claims. *Id.*)

After deliberations, the jury returned a special verdict that rejected the Federations' claims. The jury found that the Federations had failed to prove any requisite "agreement." Opp. App. 2a. It also found that the Federations failed to prove any relevant market. Opp. App. 6a, 9a, 12a. As such, the jury rejected both the Section 1 and the Section 2 claims.

The Federations did not file any post-trial motion to challenge the jury's finding that the Federations failed to prove a relevant market.

C. The Third Circuit Unanimously Affirmed the Jury Verdict.

The Federations appealed the judgment with respect to the failed Section 1 claims against ATP. The Federations did not appeal the jury verdict rejecting their Section 2 claims.

The Third Circuit unanimously affirmed the jury's verdict and the resulting judgment.[2] Pet. App. 3a. The Third Circuit found that the jury's finding of no relevant market with respect to the Section 2 claims was equally applicable to, and doomed, the Section 1 claims because the claims rested on identical proposed market definitions. Pet. App. 11a-12a n.5, 12a n.6, 33a.

The Third Circuit rejected the Federations' arguments that the District Court should have instructed the jury under a Quick Look analysis and that such analysis would have relieved the Federations of their failure of proof on a relevant market. The Third Circuit affirmed that Quick Look was inappropriate given, among other things, the substantial, factual disputes as to the Federations' claims of a "top player services" market to this case:

> "Although the Federations contended the Brave New World Plan restrained the 'top player services' market, the definition of the relevant market was one of the most contested issues at trial – so much so that after all the evidence was presented the District Court saw the bounds of

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[2] The Third Circuit also affirmed the antitrust and fiduciary duty claims against the individual Board members. Pet. App. 23a-24a n.8, 34a-41a.

> the relevant market as 'ambiguous.' Because 'the contours of the market' here are not 'sufficiently well known or defined to permit the court to ascertain without the aid of extensive market analysis whether the challenged practice impairs competition,' 'quick look' is not appropriate and proof of relevant market is required under full-scale rule of reason."

Pet. App. 20a-21a (quoting *Worldwide Basketball*, 388 F.3d at 961).

The Third Circuit also reasoned, in *dicta* not essential to the judgment, that even if Quick Look had been applied initially, ATP's substantial evidence of the procompetitive effects of BNW would have required the jury to undertake a full-scale Rule of Reason analysis. Pet. App. 22a-23a. Thus, any error the District Court made in not applying Quick Look ultimately was harmless. *Id.*

REASONS FOR DENYING THE PETITION

The Third Circuit correctly affirmed the verdict and judgment. It did so by applying standard, long-settled antitrust law to the jury's finding of fact. No further review by this Court is required.

I. The Third Circuit Applied Well-Established Antitrust Law Precluding a Quick Look Analysis Given the Disputed, and Ultimately Unproven, "Top Player Services" Market as well as the Lack of Inherently Suspect Conduct.

The Federations indisputably failed to prove the existence of the market on which they chose to rest their Section 1 claims – namely, a vaguely defined "top-tier" player services market. The Federations do not challenge the jury instructions concerning their posited market. Nor do they claim that they were unlawfully barred from presenting their best

evidence of such a market. They also do not dispute that, under a Rule of Reason analysis, the failure to prove a relevant market precludes Section 1 liability as a matter of law.

Instead, each of the Federations' arguments for review presumes that, if a Quick Look analysis were used, the failure to prove a "top-tier" player services market somehow could be ignored. Respectfully, the Federations have it exactly backwards. This was never a Quick Look case given the lack of any naked restraint, inherently suspect conduct, or obvious anticompetitive market impact. The Federations cannot remake it into a Quick Look case *post hac* to avoid their failed trial strategy and the consequent jury finding. Quick Look is a procedural device used to cut to the chase when the anticompetitive effects on a posited market are obvious, not to ignore a jury finding that a market is so *un*obvious that it was not proven after a two week trial.

The antitrust principles applied by the Third Circuit are clear and long-settled.

First, every Section 1 claim is premised on harm or threatened harm to a market. This Court has made clear that the categories of *per se*, Quick Look, and Rule of Reason are merely modes of analysis along a continuum. *Cal. Dental*, 526 U.S. at 780-81 ("[T]here is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint.") Each mode of analysis ultimately is concerned with anticompetitive impacts on actual "customers and markets." *Id.* at 770; *Texaco, Inc. v.*

Dagher, 547 U.S. 1, 5, 7 n.3 (2006) (finding *per se* and Quick Look inapplicable given lack of competition between joint venturers "in the relevant market"); *Bd. of Regents*, 468 U.S. at 104 n.26 ("Per se rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct."). Thus, while different depths of analysis may be "meet for the case" depending on the particular "circumstances, details, and logic" of the challenged conduct (*Cal. Dental*, 526 U.S. at 780-81), the various modes of analysis do not change the elements of a Section 1 claim – including the need for "market" effects and, therefore, for a cognizable market.

Second, as a corollary to the above, Quick Look does not eliminate the basic Section 1 requirement of anticompetitive impact in a relevant market. *See* ABA Sec. of Antitrust Law, *Antitrust Law Developments* 65 (6th ed. 2007) ("Without defining the relevant market, there is no meaningful context within which to assess the restraint's potential competitive effects."). To the contrary, as the Third Circuit correctly explained, the threshold requirement for a Quick Look analysis is that "the anticompetitive effect on customers and markets" must be so obvious that no elaborate or detailed analysis is needed. Pet. App. at 17a (citing *Cal. Dental*, 526 U.S. at 770). The Federations clearly recognized this when they proposed Quick Look jury instructions that included a threshold finding of impact in a "relevant market." Opp. App. 16a-17a.

Third, given the prerequisites for a Quick Look analysis, where the relevant market is ambiguous or there are disputes over its contours, Quick Look is not appropriate. *Worldwide Basketball*, 388 F.3d at

961 (rejecting Quick Look and remanding for Rule of Reason review where market was "neither obvious nor undisputed" and plaintiff failed to account for market alternatives); *MLB Properties Inc. v. Salvino*, 542 F.3d 290, 332-34 (2d Cir. 2008) (Quick Look inappropriate where no proof of impact on output); *Gordon v. Lewistown Hosp.*, 423 F.3d 184, 209-10 (3d Cir. 2005) (Quick Look inappropriate for non-price vertical restraints where market effects are not obvious). In such a case a more detailed inquiry into the nature of the posited market and the impact, if any, of the challenged conduct on that market is required.

Finally, the Federations ignore that neither the District Court nor the Third Circuit concluded that there was any self-evident anticompetitive impact on the posited (but vague and unproven) "top player services" market. Although the Third Circuit also discussed general concepts concerning a market for "player services," the jury instructions confirm that is not a market that the Federations posited at trial. Opp. App. 20a-27a. In any event, neither the District Court nor the Third Circuit found the self-evident anticompetitive effect in such a market required for a Quick Look case, let alone any naked restraint or other inherently suspect conduct. At best, the Court of Appeals speculated that there "might" have been an impact on a market. That clearly is not close to a finding of an actual, obvious impact necessary for Quick Look. The Third Circuit's comment is nothing more than the observation that, as in any Rule of Reason case that goes to a jury, there may be competitive impacts for the jury to find and to weigh.

II. There is No Circuit Split on the Requirement of a Relevant Market for a Quick Look Analysis.

Because this never was and is not now a Quick Look case (and because the Federations failed to preserve any claim to Quick Look treatment), review is not necessary to resolve any alleged "circuit split" concerning the role of relevant markets in Quick Look cases. In any event, the Third Circuit adhered to established Section 1 and Quick Look principles. The Federations manufacture a "split" based on tortured readings of excerpts from opinions divorced from their context. None of the cases cited by the Federations conflict with the Third Circuit's ruling.

In *Cal. ex rel. Brown v. Safeway, Inc.*, ___ F.3d __, 2010 WL 3222187 (9th Cir. Aug. 17, 2010), the Ninth Circuit applied Quick Look to an agreement among a group of supermarket competitors to share profits during a labor strike. The court held this agreement between competitors created "a great likelihood of anticompetitive effects" by creating a "negative effect on their incentives to compete with one another for customers." *Id.* at *11-12. The Ninth Circuit identified the group's "60% or 70% of the market share" of the "Southern California [grocery] market" as a significant factor in its finding of likely anticompetitive effects of the agreement between competitors. *Id.* at *13.

The Ninth Circuit's holding in *Oltz v. St. Peter's Cmty. Hosp.*, 861 F.2d 1440 (9th Cir. 1988) did not involve a Quick Look approach. Nonetheless, that case also cited the defendant's 84% market share as a persuasive factor in affirming a directed verdict that the relevant market was the market for anesthesia services in Helena. *Id.* at 1442, 1447. The record in *Oltz* contained evidence of actual

anticompetitive effects in that market through a reduction in output and a corresponding increase in consumer prices. *Id.* at 1448. By contrast, the Third Circuit here held the record evidence was insufficient to demonstrate actual anticompetitive effects "without the aid of extensive market analysis." Pet. App. 20a-21a (quoting *Worldwide Basketball*, 388 F.3d at 959).

In *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005), the D.C. Circuit reviewed the FTC's determination that competitors who had entered a joint venture violated Section 5 of the Federal Trade Commission Act by agreeing to enact price restrictions and limit advertising on their own products that competed with the joint venture's product. The D.C. Circuit agreed with the FTC that appellants "failed to identify any competitive justification" for conduct that "looks suspiciously like a naked price fixing agreement between competitors." 416 F.3d at 37-38. The court held that this conduct was sufficiently suspect to presume "a deleterious effect upon consumers" because "agreements restraining autonomy in pricing and advertising impede the 'ordinary give and take of the market place.'" *Id.* at 37 (citing *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1987)). The D.C. Circuit did not, however, find that the determination of a relevant market (or, as here, a jury's determination that the alleged relevant market has not been proven) has no significance in a Quick Look analysis.

Likewise, in *Law v. NCAA*, 134 F.3d 1010, 1017 (10th Cir. 1998), the Tenth Circuit found an agreement among NCAA member institutions to limit the salaries of assistant basketball coaches "constitutes the type of naked horizontal agreement

among competitive purchasers to fix prices usually found to be illegal *per se*" but applied Quick Look because horizontal restraints were necessary to produce the product of college basketball. "No 'proof of market power' is required where the very purpose and effect of a horizontal agreement is to fix prices so as to make them unresponsive to a competitive marketplace." *Id.* at 1020 (citing *Bd. of Regents*, 468 U.S. at 110). Nowhere did the Tenth Circuit hold, as the Federations suggest, that a jury's factual finding that a plaintiff failed to prove a relevant market is irrelevant under a Quick Look analysis.

III. The Federations Did Not Move for Quick Look Treatment in the District Court.

Even if the substantive parameters for Quick Look existed, the Federations never made any motion for judgment as a matter of law under Fed. R. Civ. P. 50 for the District Court to condemn the ATP's BNW under Quick Look. Instead, they merely proposed supposed Quick Look jury instructions. Opp. App. 16a-19a. The Federations' strategic choices resulted in procedural defaults that preclude review of any Quick Look issues.[3]

First, Quick Look is not a jury issue. It is a "procedural device" used by courts to assess whether "inherently suspect" conduct should be condemned as unlawful by the court without a plenary trial or, instead, assessed by a jury under a full Rule of

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[3] Although the Third Circuit's conclusions obviated the need to address the Federations' procedural defaults, ATP preserved this issue for appeal. ATP raises this issue here to preserve it for its potential merits brief. *Alabama v. Shelton*, 535 U.S. 654 (2002).

Reason analysis. *Antitrust Law Developments* 59-60. As the ABA Model Jury Instructions in Civil Antitrust Cases explains, "because application of the quick look analysis is a question of law to be determined by the court," there are no jury instructions for Quick Look. ABA Section of Antitrust Law, Model Jury Instructions in Civil Antitrust Cases A-8, n.2 (2005). Leading commentators likewise confirm that Quick Look is an analysis "to enable *the court* to make a judgment on reasonableness." Areeda & Hovenkamp, *Antitrust Law*, ¶ 1914(d) at 355-356 (2d ed. 2005) (emphasis added).

Second, the jury instructions that the Federations proposed were expressly premised on the District Court first making findings that "as a matter of law . . . these restraints constitute . . . naked restraints of trade" resulting in "significant competitive harm." Opp. App. 16a. But, in fact, the Federations had never made any motion asking the District Court to make such determinations "as a matter of law." Thus, even if Quick Look were a jury issue and not simply a procedural tool for the courts, the Federations failed to seek the threshold court findings "as a matter of law" on which their own jury instructions were premised. As explained above, the District Court found that, on the evidence presented at trial, the market definitions, dynamics, and competitive effects were too complex and non-obvious to warrant either *per se* or Quick Look treatment.

Finally, the Federations also are precluded from attacking the sufficiency of the evidence supporting the jury's special verdict on relevant markets because they failed to make the requisite Rule 50

motions below. *Unitherm Food Sys. v. Swift-Eckrich, Inc.*, 546 U.S. 394, 400-402 (2006).

IV. The Burden of Proof Under Quick Look and the Analysis of Competitive Impacts on Related Markets Are Irrelevant Here and In All Events Correctly Stated by the Third Circuit.

The Federations incorrectly claim that (a) Quick Look puts the burden on the antitrust defendant to establish procompetitive justifications that outweigh the presumed anticompetitive effects (Pet. at 34) and (b) that Section 1 myopically focuses solely on alleged competitive impacts to the plaintiff's chosen market – and prohibits courts and juries from considering procompetitive justifications in any other market, including related markets (Pet. at 15-22). Neither argument is relevant given the Federations' failure to prove any relevant market. The Federations are wrong on both counts in any event.

With respect to the burden of proof, none of the cases the Federations cite even reach this issue. The Third Circuit accurately stated (in *dicta*) that it was the Federations' burden to establish that BNW's alleged anticompetitive effects outweighed the procompetitive benefits that ATP established.

This Court held in *Cal. Dental* that, upon a showing of an "obvious" likelihood of anticompetitive effects, "quick look analysis in effect requires" a court to "shift[] to a defendant the burden to show empirical evidence of procompetitive effects." 526 U.S. at 775 n.12. This is a burden of production, not a burden of proof. This Court has never held that a defendant bears the burden to show "empirical evidence of procompetitive effects" *outweigh* the presumed anticompetitive effects. *See also* Areeda & Hovenkamp, ¶ 1914(d) at 356 ("[I]f a proper

competitive justification is adequately demonstrated [by the defendant]...the burden of showing market power and presumed or actual anticompetitive effects falls on the plaintiff....").

The Federations themselves proposed that the jury be instructed that "[t]he challenged restraint is illegal under Section 1 of the Sherman Act if you find that the competitive harm outweighs the competitive benefit," (Opp. App. 16a.) and that, "[i]f the competitive harm outweighs the competitive benefits, then the challenged restraint is unreasonable. If the competitive harm does not outweigh the competitive benefits, then the challenged restraint is not unreasonable." Opp. App. 19a. In short, the Federations' own proposed instructions confirmed that the burden of proof remains on the antitrust plaintiff to show that anticompetitive effects outweigh competitive benefits.

The two cases the Federations rely on to frame a purported "circuit split" are not to the contrary. Neither *Safeway*, *supra*, nor *Polygram*, *supra*, reached the issue of who bears the burden under Quick Look with respect to balancing the competitive effects of an alleged restraint. In both cases, the defendant failed to establish evidence of *any* legitimate procompetitive effects.

In *Safeway*, the Ninth Circuit quoted *Cal. Dental* in describing the Quick Look burden of the defendant grocery stores to produce evidence of procompetitive effects of their agreement to share profits during a labor dispute. 2010 WL 3222187 at *9, 16. The Ninth Circuit found that the only "benefit" the defendants offered was that the profit sharing agreement would help them win their labor dispute,

which in turn would allow them to pay lower wages, and in turn offer lower prices to consumers. The Ninth Circuit rejected this argument, holding that "driving down compensation to workers is not a benefit to consumers cognizable under our laws as a 'procompetitive' benefit." *Id.* at *17. Because the "defendants offer[ed] no plausible procompetitive benefits," the Ninth Circuit did not reach the issue of who bears the burden of weighing procompetitive and anticompetitive effects under Quick Look. *Id.* at *5.

Similarly, in *Law*, the Tenth Circuit articulated the defendant's burden under Quick Look: "Once the plaintiff meets that burden [of establishing anticompetitive effects]...the burden shifts to the defendant to justify the restraint as a 'reasonable' one." 134 F.3d at 1021. In describing the defendant's burden to "justify the restraint," the Tenth Circuit distinguished the Fifth Circuit's holding in *Hennessy v. NCAA*, 564 F.2d 1136, 1153-54 (5th Cir. 1977), in which the Fifth Circuit "admittedly border[ed] on speculation" in presuming the reasonableness of an NCAA rule capping the number of assistant basketball and football coaches so as to avoid "foreclose[ing], by way of injunction, any opportunity to build up experience on which the issue could ultimately be judged." *Law* held that the defendant NCAA failed to establish any evidence of procompetitive effects, not – as the Federations suggest – that the defendant failed to prove the procompetitive effects outweighed the anticompetitive effects. 134 F.3d at 1022-1024.

The Federations also wrongly claim that the Third Circuit created a "conflict" when it observed that ATP's evidence of procompetitive benefits in

"the sports and entertainment market" could be weighed by a jury against the Federations' claimed evidence of anticompetitive impacts on their asserted input market for "top player services."

First, again, the Third Circuit's observation was *dicta* not necessary to its holding given the Federations' failure of proof as to any relevant market.

Second, the case law is clear that a competitive analysis is not strictly limited to one market and, instead, should include consideration of related markets. *See, e.g.*, *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 52 n.19, 54-55 (1977) (recognizing that positive effects on interbrand competition can justify anticompetitive effects on intrabrand competition, even though "the degree of intrabrand competition is wholly independent of the level of interbrand competition."); *Bd. of Regents*, 468 U.S. at 115-20 (considering the NCAA's interest in protecting live attendance at untelevised games and the NCAA's "legitimate and important" interest in maintaining competitive balance between amateur athletic teams as a justification for asserted restraint on the market for the telecasting of collegiate football games); *Sullivan v. NFL*, 34 F.3d 1091, 1111-13 (1st Cir. 1994) (noting that cases from Supreme Court and Circuits have looked to procompetitive benefits beyond the relevant market where the benefits in one market are related to another) (citing, *inter alia*, *Continental T.V.*, *supra*, *Bd. of Regents*, *supra* and *Los Angeles Mem'l Coliseum Comm'n v. NFL*, 726 F.2d 1381, 1404-1405 (9th Cir. 1984)); *Toscano v. PGA Tour*, 201 F. Supp. 2d 1106, 1121 (E.D. Cal. 2002) (rejecting Quick Look review when the PGA proffered evidence that its eligibility rules had the procompetitive effect of "ensur[ing] that spectators

see the marquee players they want to see thereby helping to attract sponsors who ultimately finance the Senior PGA Tour and create the product.").

Finally, the Federations ignore the evidence that ATP presented at trial of the vast array of procompetitive benefits that BNW would have in the production of men's tennis events, including increased player compensation, better travel schedules (protecting player health), increased investment in facilities, increased geographic reach of the Tour, increased and better quality broadcasting, and an easier to understand and more exciting overall format for the Tour season. Pet. App. 22a. ATP brought forth this evidence of wide-ranging procompetitive effects of BNW in the face of the Federations' assertion of restraints in three vaguely defined alleged relevant markets: the market for "top player services," the market for "top-tier men's professional tennis events," and the market for "sanctions for top-tier men's professional tennis events." Opp. App. 201. Nevertheless, as this Court recently stated in *Am. Needle, Inc. v. Nat'l Football League*, __ U.S. __, 130 S. Ct. 2201, 2216-17 (2010), a sports league's interest "in making the entire league successful and profitable" can justify many restraints within the league and its input markets.

V. The Federations Failed to Prove Additional Prerequisites to Recovery.

Review of this case also would be of no practical utility because, even if the Federations could overcome their fundamental failure of proof of a relevant market under a Quick Look approach, their claims fail for additional, independent reasons.

Specifically, the Federations failed to prove that they had suffered any antitrust injury or possessed antitrust standing. Proof of both antitrust injury and antitrust standing are required to prevail on a Section 1 claim. *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 489 (1977) (antitrust injury); *Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 538-40 (1983) (antitrust standing). The Federations' failures of proof are dispositive of any appeal.[4]

It was the Federations' burden to prove that they had suffered "antitrust injury" – *i.e.* injury "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick*, 429 U.S. at 489. The only injury they alleged was not injury to competition, but injury to the Federations as competitors for "top player services." A key executive for the Federations made this absolutely clear at trial when he testified that the Federations' goal in the lawsuit was not to challenge an anticompetitive system of player allocation, but to remain as a top-tier event within the Tour. Opp. App., 29a-30a. The Federations did not allege, and the jury did not find, the existence of any barriers that would prevent the Federations or any other potential competitor from "competing for players by forming a competitive league." *Mid-South Grizzlies v. NFL*, 720 F.2d 772, 787 (3d Cir. 1983). Indeed, if BNW had resulted in any restraint on

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[4] Although the Third Circuit's conclusions obviated the need to address the Federations' lack of antitrust standing and antitrust injury, ATP preserved both issues for appeal and does so here to preserve them for any review by this Court. *Shelton*, 535 U.S. 654.

compensation to the players, that restraint would have made it easier for the Federations and others to form a competitive league and offer the players greater compensation. Even more fundamentally, where no market has been proven, a party plainly has no injury and no standing to recover. *Eichorn v. AT&T Corp.*, 248 F.3d 131, 140 (3d Cir. 2001) (no "antitrust injury unless the activity has a wider impact on the competitive market.")

The Federations also were required to prove "antitrust standing" by showing that their alleged injuries were "the type that the antitrust statute was intended to forestall" and that the Federations were appropriate parties to seek redress. *Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S. 519, 538-40 (1983); *Cargill v. Monfort of Col.*, 479 U.S. 104, 110 n.5 (1986) ("[A] party may have suffered antitrust injury but may not be a proper party under § 4 for other reasons."). Any alleged claim that ATP restricted a market for "top player services" would be more directly brought by the players whose ability to market their services allegedly would have been constrained.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for a writ of certiorari.

Respectfully submitted.

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OCTOBER 27, 2010

APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

[Filed 10/03/2008]

Civil Action No. 07-178 GMS

DEUTSCHER TENNIS BUND *et al.*,
Plaintiffs,

v.

ATP TOUR, INC. *et al.*,
Defendants.

JUDGMENT

This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict on August 5, 2008. The verdict was accompanied by a verdict form (D.I. 195), a copy of which is attached hereto. Therefore,

IT IS HEREBY ORDERED AND ADJUDGED that judgment be and is hereby entered in favor of the defendant, ATP TOUR, INC., and against the plaintiffs, DEUTSCHER TENNIS BLIND, ROTHENBAUM SPORTS GMBH AND QATAR TENNIS FEDERATION.

Dated: October 3, 2008

/s/ Gregory M. Sleet
CHIEF, UNITED STATES DISTRICT JUDGE

SHERMAN ACT § 1

WE, THE JURY, unanimously find as follows:

1. Have Plaintiffs proven by a preponderance of the evidence that the Defendant entered into contract(s), combination(s) or conspiracy(ies) with any separate entity or entities? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 2 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 1 Yes ___ No _X_

(for Plaintiffs) (for Defendant)

If you answered "Yes," please specify all parties to each such agreement:_____

2. Have Plaintiffs proven by a preponderance of the evidence the existence of a relevant product market within a relevant geographic market? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 3 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 2 Yes ___ No ___

(for Plaintiffs) (for Defendant)

If you answered "Yes," please specify each relevant product market and the associated geographic market:_____

3. Have Plaintiffs proven by a preponderance of the evidence that any contract, combination or conspiracy that you found in question 1 had a harmful effect on competition in a relevant product and geographic market(s)? (A "yes" answer to this ques-

tion is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 4 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 3 Yes ___ No ___

(for Plaintiffs) (for Defendant)

If you answered "Yes," please specify the associated relevant product and geographic market(s): _____

4. Do you find by a preponderance of the evidence that any contract, combination or conspiracy for which you answered "Yes" to question 3 had procompetitive benefits? (A "yes" answer to this question is a finding for the Defendant. A "no" answer is a finding for Plaintiffs. If "yes," proceed to question 5 below. If "no," proceed to question 7 below.)

Question 4 Yes ___ No ___

(for Plaintiffs) (for Defendant)

5. Do you find by a preponderance of the evidence that any contract, combination or conspiracy for which you answered "Yes" to question 4 was reasonably necessary to achieve the procompetitive benefits you found? (A "yes" answer to this question is a finding for the Defendant. A "no" answer is a finding for Plaintiffs. If "yes," proceed to question 6 below. If "no," proceed to question 8 below.)

Question 5 Yes ___ No ___

(for Plaintiffs) (for Defendant)

6. Have Plaintiffs proven by a preponderance of the evidence that the harmful effect on competition of any contract, combination or conspiracy for which you answered "Yes" to question 5 substantially

outweighs the procompetitive benefits you found? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 7 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 6 Yes ___ No ___

(for Plaintiffs) (for Defendant)

If you answered "Yes," please specify the associated relevant product and geographic market(s): _____

7. Do you find by a preponderance of the evidence that the contract(s), combination(s) or conspiracy(ies) the Defendant entered was or were a material cause of any injury to the Plaintiffs in their business or property? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question .8 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 7 Yes ___ No ___

(for Plaintiffs) (for Defendant)

8. For any injury you found in response to question 7, do you find by a preponderance of the evidence that any such injury to Plaintiffs was caused by a reduction in competition, acts that would lead to a reduction in competition., or acts that would otherwise harm consumers? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 9 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 8 Yes ___ No ___

(for Plaintiffs) (for Defendant)

9. For any injury for which you answered "Yes" to Question 8, do you find by a preponderance of the evidence that Plaintiffs failed to take all reasonable steps available to minimize their losses? (A "yes" answer to this question is a finding for the Defendant. A "no" answer is a finding for Plaintiffs. If "no," proceed to question 10 below and do not answer question 11. If "yes," please proceed to question 11 below and do not answer question 10.)

Question 9 Yes ___ No ___

(for Plaintiffs) (for Defendant)

10. For any injury for which you answered "No" to question 9, what is the total amount of damages that would fairly compensate Plaintiffs for this injury based on the evidence available to you? Write your answer in the line labeled "Amount" below.

11. For any injury for which you answered "Yes" to question 9, what is the total amount of damages that would fairly compensate Plaintiffs for this injury if they had take all reasonable steps to mitigate their damages? Write your answer in the line labeled "Amount" below.

Amount: _____

WHEN THE JURY HAS REACHED A VERDICT, THE FOREPERSON MUST SIGN THIS VERDICT FORM AND SIGNAL THE U.S. MARSHALL THAT THE JURY IS READY TO RENDER A VERDICT.

Date: 8-5-08 Jury Foreperson:

[Redacted Stamp]

SHERMAN ACT § 2 - MONOPOLIZATION

WE, THE JURY, unanimously find as follows:

1. Have Plaintiffs proven by a preponderance of the evidence the existence of any relevant product market(s) within any relevant geographic market(s)? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 2 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 1 Yes ___ No _X_

(for Plaintiffs) (for Defendant)

If you answered "Yes," please specify all parties to each such agreement: _____

2. Have Plaintiffs proven by a preponderance of the evidence that the Defendant had monopoly power in any market for which you answered "Yes" to Question 1? (A "yes" answer to this question is a finding for Plaintiffs, A "no" answer is a finding for the Defendant. If "yes," proceed to question 3 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 2 Yes ___ No ___

(for Plaintiffs) (for Defendant)

If you answered "Yes," please specify to which relevant product and geographic market(s) this answer applies: _____

3. For each relevant product market you listed in your answer to question 2, have Plaintiffs proven by a preponderance of the evidence that Defendant willfully acquired or maintained monopoly power through exclusionary conduct without legitimate

reasons for engaging in such conduct? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 4 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 3 Yes ___ No ___

(for Plaintiffs) (for Defendant)

If you answered "Yes," please specify to which relevant product and geographic market your answer applies:

4. Have Plaintiffs proven by a preponderance of the evidence that the conduct for which you answered "Yes" to question 3 caused injury to the Plaintiffs in their business or property? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 5 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 4 Yes ___ No ___

(for Plaintiffs) (for Defendant)

5. For any injury you found in response to question 4, do you find by a preponderance of the evidence that any such injury to Plaintiffs was caused by a reduction in competition, acts that would lead to a reduction in competition, or acts that would otherwise harm consumers? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 6 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 5 Yes ___ No ___

(for Plaintiffs) (for Defendant)

6. For any injury for which you answered "Yes" to Question 5, do you find by a preponderance of the evidence that Plaintiffs failed to take all reasonable steps available to minimize their losses? (A "yes" answer to this question is a finding for the Defendant. A "no" answer is a finding for Plaintiffs. If "no," proceed to question 7 below and do not answer question 8. If "yes," please proceed to question 8 below and do not answer question 7.)

Question 6 Yes ___ No ___

(for Plaintiffs) (for Defendant)

7. For any injury for which you answered "No" to question 6, what is the total amount of damages that would fairly compensate Plaintiffs for this injury based on the evidence available to you? Write your answer in the line labeled "Amount" below.

8. For any injury for which you answered "Yes" to question 6, what is the total amount of damages that would fairly compensate Plaintiffs for this injury if they had taken all reasonable steps to mitigate their damages? Write your answer in the line labeled "Amount" below.

Amount:_____

WHEN THE JURY HAS REACHED A VERDICT, THE FOREPERSON MUST SIGN THIS VERDICT FORM AND SIGNAL THE U.S. MARSHALL THAT THE JURY IS READY TO RENDER A VERDICT.

Date: 8-5-08 Jury Foreperson:

[Redacted Stamp]

SHERMAN ACT § 2 - ATTEMPTED MONOPOLIZATION

WE, THE JURY, unanimously find as follows:

1. Have Plaintiffs proven by a preponderance of the evidence the existence of a relevant product market within a relevant geographic market? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 2 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 1 Yes ___ No _X_

(for Plaintiffs) (for Defendant)

If you answered "Yes," please specify all parties to each such agreement: _____

2. Have Plaintiffs proven by a preponderance of the evidence that the Defendant engaged in anticompetitive conduct with an intent to achieve monopoly power in a relevant product market within a relevant geographic market for which you answered "Yes" to Question 1? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 3 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 2 Yes ___ No ___

(for Plaintiffs) (for Defendant)

If you answered "Yes," please specify the associated product and geographic market(s):

_____

3. Have Plaintiffs proven by a preponderance of the evidence that there is a dangerous probability

that the Defendant would achieve its goal of monopoly power in any relevant product market? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 4 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 3 Yes ___ No ___

(for Plaintiffs) (for Defendant)

If you answered "Yes," please specify the associated product and geographic market(s):

_____

4. Have Plaintiffs proven by a preponderance of the evidence that the actions of the Defendant caused injury to the Plaintiffs in their business or property? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 5 below. If "no," please sign the jury verdict form and return it to the U.S. Marshall.)

Question 4 Yes ___ No ___

(for Plaintiffs) (for Defendant)

5. For any injury you found in response to question 4, do you find by a preponderance of the evidence that any such injury to Plaintiffs was caused by a reduction in competition, acts that would lead to a reduction in competition, or acts that would otherwise harm consumers? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant, If "yes," proceed to question 6 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 5 Yes ___ No ___

(for Plaintiffs) (for Defendant)

6. For any injury for which you answered "Yes" to question 5, do you find by a preponderance of the evidence that Plaintiffs failed to take all reasonable steps available to minimize their losses? (A "yes" answer to this question is a finding for the Defendant. A "no" answer is a finding for Plaintiffs. If "no," proceed to question 7 below and do not answer question 8. If "yes," please proceed to question 8 below and do not answer question 7.)

Question 6 Yes ___ No ___

(for Plaintiffs) (for Defendant)

7. For any injury for which you answered "No" to question 6, what is the total amount of damages that would fairly compensate Plaintiffs for this injury based on the evidence available to you? Write your answer in the line labeled "Amount" below.

8. For any injury for which you answered "Yes" to question 6, what is the total amount of damages that would fairly compensate Plaintiffs for this injury if they had taken all reasonable steps to mitigate their damages? Write your answer in the line labeled "Amount" below.

Amount: _____

WHEN THE JURY HAS REACHED A VERDICT, THE FORE PERSON MUST SIGN THIS VERDICT FORM AND SIGNAL THE U.S. MARSHALL THAT THE JURY IS READY TO RENDER A VERDICT.

Date: 8-5-08 Jury Foreperson:

[Redacted Stamp]

SHERMAN ACT § 2 - CONSPIRACY TO MONOPOLIZE

WE, THE JURY, unanimously find as follows:

1. Have Plaintiffs proven by a preponderance of the evidence the existence of a relevant product market within a relevant geographic market? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 2 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 1 Yes ___ No X

(for Plaintiffs) (for Defendant)

If you answered "Yes," please specify all parties to each such agreement: _____

2. Have Plaintiffs proven by a preponderance of the evidence that the Defendant entered into an agreement or mutual understanding to obtain or maintain monopoly power in a relevant market within a relevant geographic market? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 3 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 2 Yes ___ No ___

(for Plaintiffs) (for Defendant)

If you answered "Yes," please specify the associated product and geographic market(s): _____

3. Have Plaintiffs proven by a preponderance of the evidence that the Defendant knowingly became parties to that agreement or mutual understanding?

(A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 4 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 3 Yes ___ No ___

(for Plaintiffs) (for Defendant)

4. Have Plaintiffs proven by a preponderance of the evidence that the Defendant intended that the parties to the agreement or mutual understanding would obtain or maintain monopoly power in any relevant product market within a relevant geographic market you specified in your answer to question 2? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 5 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 4 Yes ___ No ___

(for Plaintiffs) (for Defendant)

If you answered "Yes," please specify the associated product and geographic market(s):

_____

5. Have Plaintiffs proven by a preponderance of the evidence that the Defendant took an overt act in furtherance of that agreement or mutual understanding? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 6 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 5 Yes ___ No ___

(for Plaintiffs) (for Defendant)

If you answered "Yes," please specify the associated relevant product market(s):

_____

6. Do you find by a preponderance of the evidence that the anticompetitive actions of the Defendant caused injury to the Plaintiffs in their business or property? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 7 below. If "no," please sign the jury verdict form and return it to the U.S. Marshall.)

Question 6 Yes ___ No ___

(for Plaintiffs) (for Defendant)

7. For any injury you found in response to question 6, do you find by a preponderance of the evidence that any such injury to Plaintiffs was caused by a reduction in competition, acts that would lead to a reduction in competition, or acts that would otherwise harm consumers? (A "yes" answer to this question is a finding for Plaintiffs. A "no" answer is a finding for the Defendant. If "yes," proceed to question 8 below. If "no," please sign this jury verdict form and return it to the U.S. Marshall.)

Question 7 Yes ___ No ___

(for Plaintiffs) (for Defendant)

8. For any injury for which you answered "Yes" to Question 7, do you find by a preponderance of the evidence that Plaintiffs failed to take all reasonable steps available to minimize their losses? (A "yes" answer to this question is a finding for the Defen-

dant. A "no" answer is a finding for Plaintiffs. If "no," proceed to question 9 below and do not answer question 10. If "yes," please proceed to question 10 below and do not answer question 9.)

Question 8 Yes ___ No ___

(for Plaintiffs) (for Defendant)

9. For any injury for which you answered "No" to question 8, what is the total amount of damages that would fairly compensate Plaintiffs for this injury based on the evidence available to you? Write your answer in the line labeled "Amount" below.

10. For any injury for which you answered "Yes" to question 8, what is the total amount of damages that would fairly compensate Plaintiffs for this injury if they had taken all reasonable steps to mitigate their damages? Write your answer in the line labeled "Amount" below.

Amount: _____

WHEN THE JURY HAS REACHED A VERDICT, THE FOREPERSON MUST SIGN THIS VERDICT FORM AND SIGNAL THE U.S. MARSHALL THAT THE JURY IS READY TO RENDER A VERDICT.

Date: 8-5-08 Jury Foreperson:

[Redacted Stamp]

APPENDIX B

Plaintiffs' Proposed Antitrust Jury Instruction 7

Antitrust Claims: Sherman Act Section 1
Rule of Reason – Quick Look

Under Section 1 of the Sherman Act, a restraint of trade is illegal if it is found to be unreasonable. You must determine, therefore whether the restraints challenged here are unreasonable. The restraints alleged here are: the channeling of players to certain events via rules, regulations, bonuses and sanctions; the creation and sale of a limited number of "sanctions" which are required if a tournament is to attract players; the pooling of broadcast and sponsorship rights; geographic market protections for favored tournaments; calendar market protection for certain tournaments; and the limitation and/or cap of output of top-tier men's professional tennis. I have determined as a matter of law that these restraints constitute horizontal market divisions, geographic market divisions and price fixing and, as such, are naked restraints of trade. The Plaintiffs have established, therefore, that the Defendants' restraints have caused substantial harm to competition in a relevant market. You must consider whether the restraint produces countervailing competitive benefits. If you find that it does, then you must balance the competitive harm against the competitive benefit. The challenged restraint is illegal under Section 1 of the Sherman Act if you find that the competitive harm outweighs the competitive benefit. I have found as a matter of law, significant competitive harm. It is

your duty to consider the competitive benefits, if any, and to balance them against this harm.[8]

Defendants' Objection

Defendants object to Plaintiffs' Proposed Jury Instruction 16 because it is not relevant to the facts and issues to be tried, because the Court has not made the determination described and the evidence at trial will not support such a determination. Defendant further object to the extent that it purports to list specific restraints that Plaintiffs have never previously alleged. Additionally, it is unnecessary and potentially confusing to repeat Plaintiffs' allegations in the context of this instruction. Furthermore, alleged restraints Nos. 1 and 2 are unreasonably argumentative, and No. 6 is unreasonably vague and undefined.

Plaintiffs' Proposed Antitrust Jury Instruction 8

Antitrust Claims: Sherman Act Section 1
Rule of Reason – Quick Look Evidence of Competitive Benefits

As I have found that Plaintiffs have proven that the challenged restraint resulted in substantial harm to competition in a relevant markets, you must determine whether the restraint also benefits competition in other ways. The only legitimate rationales that you may consider are those that are necessary to produce competitive men's professional tennis. Further, rationales relating merely to profitability or cost savings do not qualify as a pro-competitive justification.

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[8] *Law v. NCAA*, 134 F.3d 1010, 1019-21 (10th Cir. 1998); *NCAA v. Board of Regent of the University of Oklahoma*, 104 S.Ct. 2984, 2965 (1984)

In this case, Defendants contend that the challenged restraint benefits competition the following way(s): the Defendants, certain men's professional tournaments, and certain men's professional tennis players will make more money because consumers in the relevant output market(s) will pay more therein. If you find that Defendants have proven that the challenged restraint does result in competitive benefits, then you also must consider whether the restraint was reasonably necessary to achieve the benefits. If Plaintiffs prove that the same benefits could have been readily achieved by other, reasonably available alternative means that create substantially less harm to competition, then they cannot be used to justify the restraint.[9]

Defendants' Objection

Defendants object to Plaintiffs' Proposed Jury Instruction 17 because it is not relevant to the facts and issues to be tried, because the Court has not made the determination described and the evidence at trial will not support such a determination. Defendant further object on the grounds that it contains an inaccurate and argumentative characterization of Defendants' contentions as to the pro-competitive benefits of their challenged actions.

Plaintiffs' Proposed Antitrust Jury Instruction 9

Antitrust Claims: Sherman Act Section 1 Rule of Reason – Quick Look – Evidence of Competitive Benefits

If you find that the challenged restraint was reasonably necessary to achieve competitive benefits,

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[9] ABA SECTION OF ANTITRUST LAW, MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, 2005 Edition A-10 (2005).

then you must balance those competitive benefits against the competitive harm resulting from the same restraint. If the competitive harm outweighs the competitive benefits, then the challenged restraint is unreasonable. If the competitive harm does not outweigh the competitive benefits, then the challenged restraint is not unreasonable. In conducting this analysis, you must consider the benefits and harm to competition and consumers, not just to a single competitor or group of competitors.[10]

Defendants' Objection

Defendants object to Plaintiffs' Proposed Jury Instruction 18 because it is not relevant to the facts and issues to be tried, because it eliminates the requirement that the jury determine whether there has been any competitive harm. Defendants further object on the grounds that it misstates the law. Plaintiffs bear the burden of proving that the alleged competitive harm substantially outweighs the procompetitive benefits.

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[10] ABA SECTION OF ANTITRUST LAW, MODEL JURY INSTRUCTIONS IN CIVIL ANTITRUST CASES, 2005 Edition A-12 (2005).

APPENDIX C

Antitrust Jury Instruction 2

Antitrust Claims: Sherman Act Sections 1 and 2
Private Actions Under the Antitrust Laws

This type of lawsuit is known as a private antitrust civil action. Private antitrust actions are a means of enforcing the antitrust laws, because they serve to deter defendants who have violated the antitrust laws from violating the law in the future.

Plaintiffs have brought two separate antitrust claims. Plaintiffs' first claim is under Section 1 of the Sherman Act, which prohibits a person or corporation from entering into contracts, combinations and conspiracies that unreasonably restrain trade. Plaintiffs allege that Defendants entered into agreements, combinations and conspiracies to restructure men's professional tennis that unreasonably restrained trade in the market(s) for top-tier men's professional tennis, player services for top-tier men's professional tennis, and/or sanctions for top-tier men's professional tennis.

Plaintiffs' second claim is under Section 2 of the Sherman Antitrust Act, which prohibits a person or a corporation from maintaining a monopoly in any part of our country's trade or commerce. In this case, Plaintiffs allege that Defendants unlawfully gained and maintained a monopoly in the relevant market(s); conspired to gain and maintain a monopoly in the relevant market(s); and attempted to gain and maintain a monopoly in the relevant market(s).

Antitrust Jury Instruction 13

Rule of Reason – Proof of Relevant Market

As I mentioned, Plaintiffs must show that the harm to competition occurred in an identified market, known as a "relevant market." There are two aspects to a relevant market. The first aspect is known as a relevant product market. The second aspect is known as the relevant geographic market. It is Plaintiffs' burden to prove the existence of a relevant market.

Relevant Product Market

The basic idea of a relevant product market is that it includes all products that are reasonable substitutes for each other from a buyer's point of view; that is, the products compete with each other. In other words, the relevant product market includes the products that a consumer believes are reasonably interchangeable or reasonable substitutes for each other. This is a practical test with reference to actual behavior of buyers and marketing efforts of sellers. Products need not be identical or precisely interchangeable as long as they are reasonable substitutes. For example, if consumers seeking to cover leftover food for storage considered certain types of flexible wrapping material – such as aluminum foil, cellophane, or even plastic containers – to be reasonable alternatives, then all those products would be in the same relevant product market.

To determine whether products are reasonable substitutes for each other, you should consider whether a small but significant permanent increase in the price of one product would result in a substantial number of consumers switching from that product to another. Generally speaking, a small but permanent increase in price is approximately a five percent increase in

price not due to external cost factors. If you find that such switching would occur, then you should conclude that the products are in the same product market.

In evaluating whether various products are reasonably interchangeable or are reasonable substitutes for each other, you may also consider: (1) consumers' views on whether the products are interchangeable; (2) the relationship between the price of one product and sales of another; (3) the presence or absence of specialized vendors; (4) the perceptions of either industry or the public as to whether the products are in separate markets; (5) the views of Plaintiffs and Defendants regarding who their respective competitors are; and (6) the existence or absence of different customer groups or distribution channels.

In this case, Plaintiffs define the relevant product markets as the market for the production of top-tier men's professional tennis, the market for player services for top-tier men's professional tennis, the market for hosting top-tier men's professional tennis, and/or the market for live top-tier men's professional tennis. By contrast, Defendants assert that Plaintiffs have failed to prove a proper relevant product market because Defendants claim that Plaintiffs' alleged product markets do not include all reasonably interchangeable products or substitutes. If you find that Plaintiffs have proven a relevant product market or markets that includes all reasonably interchangeable products or substitutes, then you should continue to evaluate the remainder of Plaintiffs' claim with respect to that market or those markets. However, if you find that Plaintiffs have failed to prove such a market, then you must find in Defendants' favor on this claim.

Relevant Geographic Market

For each relevant product market you determine that Plaintiffs have proven, Plaintiffs must also prove a relevant geographic market. The relevant geographic market for a given relevant product market is the area in which the defendant faces competition from other firms that compete in that relevant product market and to which customers can reasonably turn for purchases. When analyzing the relevant geographic market, you should consider whether changes in prices or product offerings in one area have substantial effects on prices or sales in another area, which would tend to show that both areas are in the same relevant geographic market. The geographic market may be as large as global or nationwide, or as small as a single town or even smaller. The relevant geographic market for one relevant product market may be larger or smaller than that for a different relevant product market.

Plaintiffs have the burden of proving the relevant geographic market by a preponderance of the evidence. In this case, Plaintiffs claim that the relevant geographic market for each of these markets is global. By contrast, Defendants assert that Plaintiffs have failed to prove a proper geographic market. In determining whether Plaintiffs have met their burden and proven that their proposed geographic market is proper, you may consider several factors, including:

- The geographic area in which the relevant products are sold and where customers for the relevant products are located;
- The geographic area to which customers turn for supply of the relevant products or have seriously considered turning; and

- The geographic areas that suppliers of the relevant products; view as potential sources of competition.

Antitrust Jury Instruction 18

Antitrust Claims: Sherman Act Section 2 – Monopolization General Elements

Plaintiffs allege that they were injured by the Defendants' unlawful monopolization of the markets for top-tier men's professional tennis; player services for top-tier men's professional tennis; and sanctions for top-tier men's professional tennis tournaments. To prevail on this claim, Plaintiffs have the burden of proving each of the following elements by a preponderance of the evidence:

First, that the alleged market is a valid antitrust market;

Second, that the ATP Tour possessed monopoly power in that market;

Third, that the Defendants "willfully" acquired or maintained monopoly power in that market by engaging in anticompetitive conduct; and

Fourth, that the Plaintiffs were injured in their business or property because of the Defendants' anticompetitive conduct.

If you find that Plaintiffs have failed to prove any of these elements as to any Defendant, then you must find for that Defendant and against Plaintiffs on this claim. If you find that Plaintiffs have proved each of these elements by a preponderance of the evidence, then you must find for Plaintiffs and against Defendants on this claim.

Antitrust Jury Instruction 24

Antitrust Claims: Sherman Act Section 2 - Attempt to Monopolize General Elements

Plaintiffs allege that they were injured by Defendants' unlawful attempt to monopolize the markets for top-tier men's professional tennis; player services for top-tier men's professional tennis; and sanctions for top-tier men's professional tennis tournaments. To prevail on its claim of attempted monopolization, Plaintiffs have the burden of proving each of the following elements by a preponderance of the evidence:

First, that Defendants engaged in anticompetitive conduct.

Second, that Defendants had a specific intent to achieve monopoly power in a relevant market;

Third, that there was a dangerous probability that Defendants would achieve their goal of monopoly power in the relevant market; and

Fourth, that Plaintiffs were injured in their business or property by Defendants' anticompetitive conduct.

If you find that the evidence is insufficient to prove any one or more of these elements against any specific Defendant, then you must find for Defendants and against Plaintiffs on Plaintiffs' claim of attempted monopolization. If you find that the evidence is sufficient to prove all four elements as to a Defendant, then you must find for Plaintiffs and against that Defendant on Plaintiffs' claim of attempted monopolization.

Antitrust Jury Instruction 27

Antitrust Claims: Sherman Act Section 2 - Conspiracy to Monopolize' General Elements

Plaintiffs allege a conspiracy to monopolize in violation of Section 2 of the Sherman Act, which declares unlawful every conspiracy to monopolize interstate or foreign commerce.

To prevail against Defendant(s) on their claim of conspiracy to monopolize, Plaintiffs have the burden of proving by a preponderance of the evidence as to Defendant(s) each of the following elements:

First, that an agreement or mutual understanding between two or more persons to obtain or maintain monopoly power in the market(s) for top-tier men's professional tennis, player services for top-tier men's professional tennis, and sanctions for top-tier men's professional tennis tournaments;

Second, that Defendant(s) knowingly - that is, voluntarily and intentionally - became a party to that agreement or mutual understanding;

Third, that Defendant(s) specifically intended that the parties to the agreement would obtain or maintain monopoly power in the market(s) for top-tier men's professional tennis, player services for top-tier men's professional tennis, and sanctions for top-tier men's professional tennis tournaments;

Fourth, that Defendant(s) committed an overt act in furtherance of the conspiracy;

Fifth, that Defendant's (or Defendants') activities occurred in or affected interstate or foreign commerce; and

Sixth, that Plaintiffs were injured in their business or property because of the conspiracy to monopolize.

If you find that the evidence is sufficient to prove each element as to a Defendant, then you must find for Plaintiffs and against that Defendant on Plaintiff's' conspiracy to monopolize claim. If you find that the evidence is sufficient to prove each element as to a defendant, then you must find for Plaintiffs and against that defendant on Plaintiff's' conspiracy to monopolize claim.

APPENDIX D

7/30/2008 Transcript of Trail (Day 8)

[JA 1729] Now, as this goes forward, the one thing I want to address is, you know, I listened yesterday, as you did, of course, too, and this comment of what happened, he was being asked about what about this market for fans? Well, there was an exchange about this Cincinnati/Washington. Well, okay, there was. But that is not our lawsuit. We're not focusing on those.

But as we get here, what we have, I have to say this is an immensely complicated area of the law. It's an immensely complicated area of just getting your mind around the economic principles involved. And I have to say I go to bed at night sometimes and I have to start over. What is Point A? What is Point B? What is Point C in the analysis, honest to God. It is that complex. And then you have courts doing their absolute best with it to see that parties are treated fairly on both sides of the case in terms of the law and the economics and the evidence. And I think we all know it is extremely subtle and it needs an extremely careful and nuanced analysis.

But that goes to the point that I think is of the essence here. There needs to be, I think the Court needs to hear from Dr. Walker and you need to hear how

Dr. Walker goes about his work. And I think that may help you understand how another economist goes about a methodology. And you may see things may become more clear

* * * *

8/2/2008 Transcript of Trial (Day 10)

[JA 2090] "Answer: I do not believe that ATP would have over the course of so many years left the Hamburg Tournament in its standing the way it was in May if ATP had not, like me, believed that that was the only logical consequence in the calendar of events on the way to Paris, to the Paris Tournament.

"Question: Would you agree there could be other logical calendars that one could create? Yes?

"Answer: I would have to be convinced, I don't see any other – any other logical calendar.

"Question: As part of how the tour should go forward, is it your view that Hamburg should continue to be a Masters series event and should receive a thousand points?

"In your view of how the tour should go forward, how should Hamburg be treated?

"Answer: If I were in Mr. de Villiers's position and looked at the overall European tennis and I weren't German, I would still be in favor of Hamburg because even in that case – so even if I were not a German, if I were an Austrian or an Italian, I would still be in favor of Hamburg because I would still think that Hamburg fits into this Masters Series circuit.

"Question: And you would be in favor of continuing a Masters Series?

"Answer: Yeah, I'm struggling, battling for the [JA 2091] resumption of Hamburg as a 1000 event, as a Masters event in May.

"Question: And as part of that you would want Hamburg to be the only event during its tournament week?

"Answer: Yes, I want the player tournament—the player commitment, excuse me, to continue as it was before, that is that the top players commit to playing that Masters Series.

"Question: And would you want Hamburg to have the benefit of the player commitment that is being proposed for the 1000 events starting in 2009?

"Answer: Yes, exactly. That's how I understand the plan, namely, that the players would have to commit to these 1000 events as a precondition of the 1000 events to take place.

"Question: With respect to which tournaments in German did you plead that they should not pay any appearance fees?

"Answer: I actually pleaded with all tournament organizers in Germany. I mean I told them that in my opinion that's the wrong way to go, but it was my opinion at the time.

"Question: Is that still your opinion?

"Answer: I am against appearance fees. That's why I'm so adamant about keeping the 1000 tournaments, [JA 2092] because it enables us to force the players to play without appearance fee.

(Deposition ends.)

. . . PETER R. GREENHALGH, having been duly sworn as a witness, was examined and testified as follows . . .

DIRECT EXAMINATION

BY MR. UNDERWOOD:

Q. Good afternoon, Mr. Greenhalgh. Could you please tell the jury what your profession is?

A. Yes. I am an economist.

Q. Do you have a particular area of focus within the broad discipline of economics?

A. Yes. I principally am what is called a micro-economist, someone who studies firms and industries. And within that broad field, my real specialty is called industrial organization, which is the specific study of firms and industries.

And even within that field, my most narrow specialty is really antitrust economics, as well as the computation of damages, both in antitrust cases and in other cases.

Q. Could you please describe your educational background?

A. Yes. I have a Bachelor's degree in mathematics from Princeton University. I then spent four years in graduate

* * * *